(21,110.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 346.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEBRASKA *EX REL.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 STATE *ex Rel.* FARMERS' ELEVATOR CO.
v.
MISSOURI PACIFIC RY. CO.

Pleas before the Supreme Court of the State of Nebraska, at a term thereof begun and holden at the Capitol, in the city of Lincoln, in said State, on the seventh day of January, 1908.

Present: Hon. John B. Barnes, Chief Justice; Hon. Charles B. Letton, Judge; Hon. Manoah B. Reese, Judge.

Attest:
HARRY C. LINDSAY, *Clerk.*

Be it remembered that on the 26th day of March, 1907, there was filed in the office of the Clerk of the said court a certain transcript in words and figures following, to-wit:

Pleas before the District Court of the First Judicial District of Nebraska in and for the County of Richardson, at a term thereof begun and holden in the City of Falls City, in said County and State, at the September, 1906, Term.

Be it remembered that heretofore to-wit on the 4th day of September, 1906, a Petition was filed in the office of the Clerk of said Court in the words and figures following to-wit:

THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA,
Relator,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Respondent.

Application for Writ of Mandamus.

2 The plaintiff complains of the defendant for that the defendant is a corporation operating a railroad in the state of Nebraska, whose duty it is to afford equal facilities to all persons or associations who desire to erect or operate or who are engaged in operating grain elevators or in handling or shipping grain at or contiguous to any station of its road. That from time prior to the year 1905 until the present time, the said defendant has continuously operated said railroad in the state of Nebraska.

That the plaintiff company is a corporation duly organized and incorporated according to the laws of the state of Nebraska, and is now engaged in operating a grain elevator on the S. W. ¼ of Section 28 Town 2 N. Range 16 E. in Richardson County, Nebraska, which is at the station of Strausville in said county and state, which station is situate on the railroad of the defendant corporation. The said elevator, which has a capacity of Fifteen Thousand Bushels

and which is now owned and operated by the said plaintiff company, was build adjacent to the right of way of the railroad of the said defendant company at the said station of Strausville and was completed prior to the first day of April, 1905.

Plaintiff further states that since the completion of the said elevator at the said station of Strausville, the defendant has failed and refused to build a side-track from its railroad to said elevator and by reason of such neglect and refusal the plaintiff has been unable to load grain directly from its elevator on to the cars of the defendant, to the great damage of the plaintiff. That on the 31st day of May, 1906, an application was made in writing by the plaintiff to the defendant for a site for the construction of an elevator on the railroad right of way of the defendant at the said station
3 of Strausville, Nebraska; that more than 60 days have now passed since the said application was made to the said defendant and the site requested by the plaintiff has not been granted by the defendant, but the same has been wholly refused and neglected.

On the 2nd day of August, 1906, the defendant was requested in writing by the plaintiff to build a side-track connecting plaintiff's elevator at the said station of Strausville with defendant's railroad in order that cars might be brought to and loaded directly from the plaintiff's elevator the same as is done at another elevator at this same station. This request was not made until after the defendant had neglected and refused to grant to plaintiff a site for plaintiff's elevator on defendant's right of way. This request has been wholly disregarded.

Plaintiff states further that the defendant has from a time prior to the first of April, 1905, until the present time maintained a side track from its railroad to an elevator, other than that of plaintiff's at the said station of Strausville and that by reason of defendant's refusal to grant a side track to plaintiff as requested, the defendant has not offered equal facilities to all persons and associations at the said station of Strausville as is required by law.

Plaintiff further states that it is entirely without remedy in the premises unless it be by the interposition of the court, and that it has no adequate remedy in the ordinary course of the law.

Plaintiff therefore prays that a writ of mandamus may issue commanding said defendant to forthwith erect, equip and maintain a side track of suitable length to approach as near as necessary to approach the said plaintiff's elevator at the said station of Strausville, Nebraska, which is erected adjacent the right of way of
4 said defendant's railroad at said station and for the costs of this action.

THE FARMERS' ELEVATOR COMPANY
OF STRAUSVILLE, NEBRASKA,
By R. C. JAMES, *Plaintiff's Att'y.*

STATE OF NEBRASKA, *Richardson County, ss:*

I, H. J. Prichard, do solemnly swear that I am the president of the plaintiff Corporation herein and that the facts stated in the foregoing petition are true.

H. J. PRICHARD.

Subscribed in my presence and sworn to before me this 30th day of August, A. D. 1906.

CHAS. LOREE,
Clk Dist. Court,
[SEAL.] By E. D. STOUGHTON, *Deputy.*

Now on this 6th day of September, 1906, at Chambers came the relator and his petition having been filed in court duly verified, and praying for a writ of Mandamus against the respondent.

It is therefore ordered that a hearing on said petition be had on the 20th day of September at 9 o'clock A. M. at the court house in Falls City, Nebraska, and that due notice thereof be given to said respondent at least 10 days before said hearing.

JOHN B. RAPER, *Judge.*

And afterwards on the 8th day of Sept., 1906, there was filed in the office of said Clerk a Certain Notice in words and figures following to-wit:

In the District Court of Richardson County, Nebraska.

THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBR.,
Relator,
vs.
5 THE MISSOURI PACIFIC RAILWAY COMPANY, Respondent.

Notice.

To the Missouri Pacific Railway Company:

You are hereby notified that on the 6th day of September, 1906, the relator, his petition having been filed in court duly verified and praying for a writ of mandamus against you, applied to the Hon. John B. Raper, Judge at Chambers who ordered and decreed that a hearing on relator's petition be had on the 20th day of September, at 9 o'clock A. M. at the Court House in Falls City, Nebraska, It is ordered that you be given notice of said hearing at least 10 days prior thereto.

THE FARMERS' ELEVATOR COMPANY,
By R. C. JAMES, *Attorney for said Company.*

Dated at Falls City, Nebr., this 8th day of September, A. D. 1906.

Received this notice on the 8th day of September, 1906, and served the same upon the Missouri Pacific Railway Company by delivering a true and certified copy of the within notice to Jos. B. Varner station agent of the Missouri Pacific Railway Company in Falls City, Nebraska. All done in Falls City, Richardson County and State of Nebraska on the 8th day of September, 1906.

W. T. FENTON, *Sheriff,*
By J. F. RICHART, *Deputy.*

Sheriff's Costs, 85¢.

And afterwards on the 21st day of Sept., 1906, there was filed in the office of said Clerk a certain Amended Application for Writ of Mandamus, in words and figures following to-wit:

6 In the District Court of Richardson County, Nebraska.

THE STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA.

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Respondent.

Amended Application for Writ of Mandamus.

The relator, the plaintiff, complains of the respondent, the defendant, for that the defendant is a corporation operating a railroad in the state of Nebraska, whose duty it is to afford equal facilities to all persons or associations who desire to erect or operate or who are engaged in operating grain elevators or in handling or shipping grain at or contiguous to any station of its road. That from a time prior to the year, A. D. 1905, until the present time, the said defendant railway company has continuously operated said railroad in the state of Nebraska and in Richardson County, in said State.

That the plaintiff company is a corporation duly organized and incorporated according to the Laws of the State of Nebraska and now engaged in operating a grain elevator on the S. W. ¼ of section 28 Town. 2, N. Range 16 E. in Richardson County, Nebraska, which is at the station of Strausville in said County and State, which station is situate on or adjacent to the railroad of the defendant corporation. The said elevator which has a capacity of Fifteen Thousand bushels and which is now owned and operated by the said plaintiff company, was built adjacent to the right of way of the said defendant company at the said station of Strausville and was completed prior to the first day of April, A. D. 1905.

The plaintiff further states that ever since the completion of the said elevator at the said station of Strausville, the defendant has failed and refused to build a side track from its railroad to
7 said elevator and by reason of such neglect and refusal the plaintiff has been unable to load grain directly from its elevator on to the cars of the defendant, to the great damage of the plaintiff. That on the 31st day of May, A. D. 1906, an application was made in writing by the plaintiff to the defendant for a site for the construction of an elevator on the railroad right of way of the defendant at the said station of Strausville, Nebraska. A copy of said application is hereto attached and marked Exhibit "A" That more than 60 days have now passed since said application was made to said defendant and the site requested by the plaintiff has not been granted by the defendant, but the same has been wholly refused and neglected.

On the 2nd day of August, A. D. 1906, the defendant was requested in writing by the plaintiff to build a side track connecting plaintiff's elevator at the said station of Strausville with defendant's

railroad in order that cars might be brought to and loaded directly from the plaintiff's elevator the same as is done at another elevator at this same station. This request was not made until after the defendant had neglected and refused to grant to plaintiff a site for plaintiff's elevator on defendant's right of way, which was more than 60 days after the application for said site was made. A copy of said written request is hereto attached and marked "Exhibit B." This request has been wholly disregarded.

Plaintiff states further that the defendant has from a time prior to the First day of April, A. D. 1905, until the present time maintained a side track from its railroad to an elevator, other than that of plaintiff at the said station of Strausville and that by reason of defendant's refusal to grant a side track to plaintiff as requested, the defendant has not offered equal facilities to all persons and
8 associations at the said station of Strausville as is required by law.

Plaintiff further states that it is entirely without remedy in the premises unless it be by the interposition of the Court, and that *is* has no remedy in the ordinary course of the law.

Plaintiff therefore prays that a writ of mandamus may issue commanding said defendant forthwith to erect, equip and maintain a side track of suitable length to approach as near as necessary *to approach* the said plaintiff's elevator at the said station of Strausville, Nebraska, which elevator is erected adjacent the right of way of said defendant's railroad, in order that grain may be loaded into cars from said elevator and for the costs of this action.

THE FARMERS' ELEVATOR COMPANY
OF STRAUSVILLE, NEBRASKA,
By R. C. JAMES, *Plaintiff's Attorney.*

THE STATE OF NEBRASKA, *Richardson County, ss:*

I, H. J. Prichard, do solemnly swear that I am president of the plaintiff corporation herein and that the facts stated in the foregoing petition are true.

H. J. PRICHARD, *President.*

Subscribed in my presence and sworn to before me this 24th day of September, A. D. 1906.

[SEAL.]

CHAS. LOREE,
Clerk of the District Court.

"EXHIBIT "A."

To the Missouri Pacific Railway Company:

The Farmers' Elevator Company of Strausville, Nebraska, which has succeeded to all the rights and properties of the National
9 Farmers' Exchange at said place, do hereby make this written application to you and do ask you for a site on the right of way of the Missouri Pacific Railway at the said station of Strausville, Nebraska, for the purpose of constructing an elevator on the

said right of way at the said station of Strausville, Nebraska, by the said Farmers' Elevator Company.

THE FARMERS' ELEVATOR COMPANY,
By H. J. PRICHARD, *President.*

Received this written application on the 31st day of May, 1906, and served the same upon the within named Missouri Pacific Railway by delivering a true and certified copy of the within application to J. B. Vaner Station Agent of the Missouri Pacific Railway Company in Falls City, Nebraska, on the 31st day of May, 1906. All done in Richardson County, Nebraska, and in the City of Falls City.

W. T. FENTON, *Sheriff.*

EXHIBIT "B."

To the Missouri Pacific Railway Company:

On the 31st day of May, 1906, the Farmers' Elevator Company of Strausville, Nebraska, through its president H. J. Prichard, served upon you a written application asking you for a site on the right of way of your road at the station of Strausville, Nebraska, for the purpose of constructing thereon an elevator. It has now been more than 60 days since the service of this application and you have neglected and refused to grant the request of the said elevator company. The Farmers' Elevator Company which succeeded to all the rights and properties of the National Farmers' Exchange at the said station of Strausville, now has as you know, an elevator constructed adjoining the right of way of your road at the said station of Strausville, Nebraska. You have steadily refused since the construction of this elevator to give it a side track or to accord it the same *privelages* that you have to a rival elevator at the same station.

Being unable to procure from you a side track, the Farmers' Elevator Company asked you for the *privelage* of constructing the elevator on your right of way. You have neglected and refused this request also. The Farmers' Elevator Company of Strausville, Nebraska, now makes a final written request of you for a side track connecting their elevator at Strausville, Nebraska, with your road, in order that cars may be loaded from this elevator the same as is done at the other elevator at this same station.

Unless this request for a side track is granted within a reasonable time. The Farmers' Elevator Company of Strausville, Nebraska, proposes to take whatever steps that are necessary at law to obtain the side track that is now requested from you and to prevent further unjust and unlawful discrimination against it.

THE FARMERS' ELEVATOR COMPANY
OF STRAUSVILLE, NEBRASKA,
By H. J. PRICHARD, *President.*

Received this written application on the 2nd day of August, A. D. 1906, and served the same upon the within named Missouri

Pacific Railway Company by delivering a true and certified copy of the within application to Jas. B. Varner station Agent of the Missouri Pacific Railway Company in Falls City, Nebraska. All done in Falls City, Richardson County, Nebraska, on the 2nd day of August, 1906.

J. E. McFARLAND, *Constable.*

11 And afterwards on the 26th day of Sept., 1906, there was filed in the office of said clerk a certain Plea in Abatement in words and figures following to-wit:

In the District Court of Richardson County, State of Nebraska.

THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA, Relator,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Respondent.

Plea in Abatement of the Respondent to the Jurisdiction of the Court.

Now comes the above named Respondent, The Missouri Pacific Railway Company and presents this, its plea in abatement to the jurisdiction of the court to hear, try and determine the subject matter of the Alternative Writ of Mandamus issued herein, and thereon alleges and charges the facts to be:

First.

That the said Respondent The Missouri Pacific Railway Company, is a railroad corporation, organized and incorporated under the laws of the state of Missouri and owns and operates a line of railway from the city of St. Louis in the state of Missouri, westwardly through the states of Kansas and Nebraska to the city of Omaha, in said state of Nebraska; that it is an interstate carrier, engaged as aforesaid in the transportation of commerce between the said several states mentioned and the Indian Territory, and has been so engaged in the operation of its railroad as such common carrier for many years last past and as such amenable to the Act of the Congress of the United
12 States known as the Interstate Commerce Act, and the *amendmnets* thereto, which went into effect on the 28th day of August, 1906.

Second.

Respondent further says that this court has no jurisdiction of the subject matter of this controversy, or of the matters and things set forth in the alternative writ of mandamus; and thereon alleges and charges the fact to be that this Respondent is an interstate carrier, and, as hereinbefore alleged, amenable to a special tribunal created by the Congress of the United States, and known as the Interstate Commerce Commission. That said plaintiff, although incorporated under the laws of the State of Nebraska, is engaged in an interstate business and the said track, spur and switch which *is* has demanded

of and from said Respondent is to be used and intended to be used for the purpose of transporting grain from its elevator to other points than in the state of Nebraska, and the transportation of which grain comes under the jurisdiction and supervision of the Interstate Commerce Commission, and the neglect and refusal of said Missouri Pacific Railway Company Respondent herein to provide said track, spur and switch, as demanded by said plaintiff can only be controlled and supervised by the Interstate Commerce Commission, and not by the courts of the State of Nebraska.

Third.

Respondent further says that said plaintiff has a full and adequate remedy provided by the Interstate Commerce Act and the Amended Interstate Commerce Act and that the Interstate Commerce Commission has full power authority and exclusive jurisdiction in the premises, and that this court has no right, power authority or jurisdiction to grant to the said plaintiff any relief in the premises.

13 Wherefore Respondent prays that said proceeding so instituted by said plaintiff herein may be abated, and that this Court shall hold and determine that it does not have jurisdiction of the subject matter of the controversy; and that said application for a writ of mandamus shall be dismissed, and this defendant required to no further answer or appear therein, and that said defendant have judgment for costs.

ISHAM REAVIS,
J. W. ORR,
B. P. WAGGENER,
Attorneys for Defendant.

STATE OF KANSAS, *Atchison County, ss:*

B. P. Waggener, being first duly sworn deposes and says, that he is the duly authorized General Attorney of the defendant above named, The Missouri Pacific Railway Company a corporation; that he has read and knows the contents of the within and foregoing Plea of Abatement, and that the matters and things therein stated are true as he verily believes.

B. P. WAGGENER.

Subscribed and sworn to before me this 22nd day of September, 1906.

NETTIE R. CLUTE,
Notary Public.

[SEAL.]

My Commission Expires Feb. 3–1909.

And afterwards on the 22nd day of October, 1906, there was filed in the office of said Clerk a certain Demurrer to Plea of Abatement in words and figures following to-wit:

14 In the District Court of Richardson County, and State of Nebraska.

THE STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA, Relator and Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Respondent and Defendant.

Demurrer of said Relator and Plaintiff.

1st. Now comes the said Relator plaintiffs in the above entitled cause and *Demurrs* to the Answer of said defendant for the following reasons:

2nd. Because the plea in abatement filed by said defendant Respondent in this action does not state facts sufficient to constitute a cause of action.

3rd. Because the plea in abatement filed by said Respondent defendant as its answer and defense in this action does not state facts sufficient to constitute any defense whatever in this action.

4th. Because the said Answer of said Respondent defendant in this action filed called a plea of abatement does not state facts sufficient to constitute a cause of action or any defense whatever to this action.

5th. Because the said Answer of said Respondent defendant filed in this action as defense to Relator plaintiff's petition does not state facts sufficient to constitute any defense whatsoever to said plaintiff's Petition, nor does it state facts sufficient to constitute any cause of action or defense to said Relator plaintiff's petition whatsoever.

6th. Because said Answer of defendant and all its allegations therein in this action is wholly insufficient to constitute any defense whatever to said relator plaintiff's petition.

15 7th. The said Relator plaintiffs, here demur to the plea of Abatement and Answer of Respondent defendant filed as an answer to said plaintiffs' petition.

R. C. JAMES &
C. GILLESPIE,
Att'ys for Relator Plaintiffs.

And afterwards on the 19th day of Oct., 1906, the following proceedings were had.

STATE *ex Rel.* FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBR.,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY.

Application for Mandamus.

Now on this Oct. 18th, 1906, this cause is set for hearing on Oct. 25th, on the demurrer of Relator to Respondent's plea in abatement of relator's action.

THE STATE *ex Rel.* FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBR.,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY.

Now on this Oct. 22nd, 1906, the Relator by leave of court is allowed to withdraw its demurrer to the plea in abatement heretofore filed by Respondent to the action of Relator and this cause is set down for hearing on Oct. 25th, on that part of said plea objecting to the jurisdiction of the court over the subject matter of said action of Relator.

STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBR.,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY.

16 Now on *the* Oct. 25th, 1906, this cause came on further to be heard on application of Relator and the plea in Abatement of Respondent on the ground that this court is without jurisdiction of the subject matter of said action. The *the* Court having heard argument of counsel for the respective parties and being fully advised in the premises, it is ordered and adjudged that the objections of Respondent to the jurisdiction of this court over the subject matter of Relator's action be and the same are hereby overruled, to which ruling the Respondent excepted.

And afterwards on the 25th day of October, 1906, there was filed in the office of said Clerk a certain Answer in words and figures following to-wit:

In the District Court of Richardson County, State of Nebraska.

THE STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Respondent.

Answer to Amended Application for Writ of Mandamus.

Now comes the respondent and, for its Answer to Amended Application, for writ of Mandamus filed by the plaintiff herein says.

First.

That it admits that it is now and at all of the time- mentioned in said amended application for writ of mandamus was a railway corporation duly organized and existing under and by virtue
17 of the laws of the state of Missouri, and doing an interstate railway and traffic business in the States of Nebraska, Kansas, Missouri, Arkansas, Louisiana, Texas and Colorado, operating lines of railway into and through each and all of the above named states,

and engaged in an interstate carrying trade of freight and passengers. That it admits that the Farmers Elevator Company of Strausville, Nebraska, is a corporation, duly organized and authorized to transact business and thereon alleged that said The Farmers' Elevator Company of Strausville, Nebraska, aforesaid is and at all of the times mentioned in said amended application for writ of mandamus was engaged in the purchase, elevation, storage and shipment of grain among the different states and over the different railroads, and was engaged in an interstate business. And defendant denies each and every other statement, averment and allegation in said application contained, except such as are hereinafter specially admitted and confessed.

Second.

Further answering this respondent says that this court has no jurisdiction of the subject matter of this action, and no authority of law, to hear, try and determine the issues thereof.

Third.

Further answering, this respondent says that it specially denies that The Farmers' Elevator Company of Strausville, Nebraska, has constructed an elevator of the capacity of fifteen thousand bushels, nor has it is any manner complied with Chapter 72 of the Compiled Statutes of Nebraska for the year 1905, and for that reason plaintiff ought not to have or maintain its said action.

Fourth.

Further answering this respondent says that the State of Nebraska has not the legal capacity to *to* sue or to maintain this action,
18 that it is not the real party in interest.

Fifth.

That plaintiff ought not to have or maintain its said action, for the reason that it seeks to recover and by virtue of Article 5 of Chapter 72 of the Compiled Statutes of Nebraska 1905 which provides among other things viz:

"Equal Facilities—Grain Elevators—Produce—Shippers.—Every railroad corporation shall give to all persons and associations reasonable and equal terms for the transportation of any merchandise owned or operated by such corporation within this State, and for terminal handling the use of the depot and other buildings and grounds of such corporations, and at any point where its railroad shall connect with any other railroad, reasonable and equal terms and facilities of interchange, and shall promptly forward merchandise consigned or directed to be sent over another road connecting with its road according to the direction therein or accompanying the same, and every railroad company or corporation operating a railroad in the state of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain at or contiguous to any station of its road and where an application

has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right of way and the same not having been granted within the limit of sixty days, the said railroad company to whom application has been made, shall erect and maintain a side track or switch of suitable length to approach as near as four feet to the outer edge of their right of way when necessary and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants adjacent to their right of way for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators or handling and shipping grain without favoritism or discrimination in any respect whatever. Provided however, that any elevator hereafter constructed in order to receive the benefits of this act must have a capacity of not less than fifteen thousand bushels. And such railroad company shall supply cars to individuals shipping their own grain on an equality with persons, associations, or corporations owning, operating or controlling such elevators, or engaged in the business of buying and shipping by loading directly into the cars.

19

"Violation of act. Any railroad company, officer, or agent thereof who willfully violates or evades any of the provisions of this Act, shall be liable to the party injured for all damages sustained by reason of such violation, and, in addition thereto, shall be liable for each offense to a penalty of five hundred dollars ($500.00) which may be recovered by the county attorney in an action brought in the name of the state of Nebraska in any county by an action in the District Court where such railroad company or corporation is doing business."

That said provisions of said act of the legislature of the state of Nebraska, are in contravention of and repugnant to the constitution of the state of Nebraska in this to-wit:

That they violate Section 15 of Article 3, which provides: "The legislature shall not pass local or special laws in any of the following cases * * * to any corporation, association or individual any special or exclusive privileges, immunity or franchise whatever."

Also:

"In all other cases where a general law can be made applicable, no special law shall be enacted."

20

That Section 1 of said Chapter 72 of Article 5 above set forth, provides among other things, as follows:

"Provides, however, That any elevator hereafter constructed in order to receive the benefits of this act, must have a capacity of not less than fifteen thousand bushels."

Which said provision granted special and exclusive privileges and immunities or franchises to a class of corporations, individuals or associations engaged in the business in said state, and is prohibited by said Section 15 of Article 3 of the Constitution.

Sixth.

Because said Article 5 of Chapter 72 of the Compiled Statutes of Nebraska, under which the plaintiff claims right to recover is violative, in contravention of and repugnant to Section 3 of Article 1, known as the Bill of Rights of the Constitution of the state of Nebraska which provides.

"No person shall be deprived of life, liberty or property without due process of law."

Seventh.

Said plaintiff ought not to have or maintain its said action, because said Article 5 of Chapter 72 of the Compiled Statutes of Nebraska, 1905 is violation of and repugnant to Section 21 of Article t-o of the Constitution of the state of Nebraska, which provides:

"The property of no person shall be taken or damaged for public use without just compensation therefor."

That section 1 of said Chapter 72 Article 5 provides, among other things:

"And every railroad company or corporation operating a railroad in the state of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain at
21 or contiguous to any station of its road, and where an application has been made in writing, for a location or site for the building or construction of an elevator or elevators on the railroad right of way and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made, shall erect, equip and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of their right of way when necessary and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants adjacent to their right of way for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain."

That said provision attempts to, and if enforced, would take the private property of this respondent and damage it, without compensation therefor, and would require this respondent to expend large sums of money and to part with and encumber its private grounds and right of way without compensation, for the private use of a private corporation.

Eighth.

Said plaintiff ought not to have or maintain its said ac-ion because said Article 5 of Chapter 72 of the Compiled Statutes of Nebraska of 1905 is violative and in contravention of and repugnant to Article 14 of the Amendments to the Constitution of the United States which provides:

"All persons born or naturalized in the United States and subject to the jurisdiction there are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the

United States nor shall any State deprive any person of life,
22 liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

That it is provided by said Article 5 of Chapter 72 that the respondent herein shall without compensation and without due process of law, part with the use of its private grounds and right of way for the benefit of another, shall expend large sums of its money and shall thereafter continue to maintain and operate a railway track without compensation, for the private benefit of a private corporation, known as the Farmers' Elevator Company of Strausville, Nebraska which is a private concern.

That Chapter 72 denies to this respondent, being within the jurisdiction of the state of Nebraska, the equal protection of the laws in that it requires it to part with its private property and money, and to continue to expend its time and money in operating and maintaining a railroad track on its own private grounds for the private advantage of a private corporation, which requirement is made of no other class of citizens of the state of Nebraska.

Ninth.

This respondent further answering, says that said plaintiff ought not to have or maintain its said action, because said respondent is a corporation organized under the laws of the State of Missouri, engaged in a freight and passenger carrying business between the different states of the Union and is engaged in interstate traffic, that the said Farmers' Elevator Company of Strausville, Nebraska, is and at all of the times mentioned in said amended application for writ of mandamus was likewise engaged in buying elevating handling and shipping grain into and through the various states of the Union and thereby, with reference to the matters and things contained
23 in plaintiff's amended application for writ of mandamus, engaged in interstate traffic, that Sections 1 and 1E of Article 5 of Chapter 72 of the Revised Statutes of the State of Nebraska, 1905 are in violation of and repugnant to that part of Section 8 of Article 1 of the Constitution of the United States, which provides:

"The congress shall have power to regulate commerce with foreign nations and among — several States and with the Indian tribes." and of the acts of congress passed in relation thereto in carrying into effect said provisions of the Constitution, and because congress has legislated upon the subject mentioned in said plaintiff's amended application for writ of mandamus, and has sole and exclusive jurisdiction and authority in relation thereto, and that said section of said Article 5 of said Chapter 72 of the Compiled Statutes of Nebraska for 1905 is an attempt on the part of the legislature of the state of Nebraska, to regulate commerce between the states and is therefore inoperative and void.

Wherefore this respondent prays to be dismissed herefrom with its costs of suit.

ISHAM REAVIS,
J. W. ORR, AND
B. P. WAGGENER,
Attorneys for Def't.

STATE OF KANSAS, *Atchison County, ss:*

James W. Orr, being duly sworn on his oath says that he is one of the duly authorized attorneys for the above named respondent, The Missouri Pacific Railway Company, a railway corporation that he has read and knows the contents of the foregoing Answer, and that the statements, averments allegations and denials therein contained are true, as he is informed and verily believes.

JAMES W. ORR.

24 Subscribed in my presence and sworn to before me this 25th day of October, 1905.

[SEAL.] CORA N. TERRY,
Notary Public.

My Commission expires Feb. 3, 1909.

And on the 2nd day of November, 1906, the following proceedings were had.

STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBR.,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY.

Now on this Nov. 2nd, 1906, this cause came on further to be heard on the application of Relator and the Answer of the Respondent Whereupon the Respondent is allowed to amend its answer instanter, by interlineation. Thereupon parties proceeded to trial of this cause to the court. And after hearing the testimony adduced by the respective parties in support of their several contentions, and after hearing arguements of the respective counsel of the parties, this cause is taken under advisement by the court.

And afterwards on the 1st day of Feb'y, 1907, there was filed in the office of said Clerk a certain Decree in words and figures following to-wit:

THE STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA, Relator,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Respondent.

Order Allowing Peremptory Writ.

Dated February 1, 1907.

25 This cause came on for hearing upon the Amended Application for Writ of Mandamus and the Answer thereto and the evidence was submitted to the Court, on consideration whereof the Court finds all the issues in favor of the relator. The Court finds that the elevator in controversy was built adjacent the right of way

of the respondent company's railroad at Strausville in Richardson County, Nebraska, and was completed and in operation prior to the first day of April, A. D. 1905, and that said elevator has a capacity of 15000 bushels or more. The Court further finds that on the 31st day of May, 1906, an application was made in writing by the relator to the respondent for a *side* for the construction of an elevator on respondent's railroad right of way at the said station of Strausville, and that after a period of more than 60 days had passed, the respondent company had wholly failed, refused and neglected to grant the site as requested, that on the 2nd day of August, 1906, the relator requested the respondent in writing to build a side track connecting relator's elevator at the said station of Strausville with respondent's railroad and that said request has been wholly disregarded.

It is therefore considered by the Court that a peremptory writ of mandamus issue against the said Missouri Pacific Railway Company a corporation respondent in this said cause, commanding it forthwith to erect, equip and maintain a proper switch or side track leading from the respondent's main line of railroad to the said relator's elevator which is situate adjacent the right of way of said respondent's railroad at the station of Strausville, in Richardson County, Nebraska which switch or side track shall be of suitable length to approach as near as necessary to approach the said relator's elevator at the said station of Strausville as to enable the said relator company to load grain directly from its said elevator into respondent's cars
26 on said switch or side track.

To all of this the said railway company, respondent excepted and prayed a Bill of Exceptions and asked an allowance of a supersedeas from this order allowing a peremptory writ of mandamus which the court hereby grants until the matter in controversy herein may be adjudicated by the Supreme Court of the State of Nebraska. The Bond of Supersedeas is fixed at $500.00 Forty days granted from the rising of the Court within which to present Bill of Exceptions. It is further considered by the Court that the respondent pay the costs of this action taxed at $—.

JOHN B. RAPER, *Judge.*

And afterwards on the 2nd day of Feb., 1907, there was filed in the office of said Clerk a certain Motion for a New Trial in words and figures following to-wit:

In the District Court of Richardson County, Nebraska.

THE STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBR., Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Respondent.

Motion for New Trial.

Now comes the respondent and moves the court to set aside the decision heretofore made and rendered in the above entitled cause

and grant to said respondent defendant a new trial, for the following causes affecting materially the substantial rights of said respondent defendant.

1st. For accident and surprise which ordinary prudence could not have guarded against.

2nd. Because said decision is not sustained by sufficient evidence.

27 3rd. Because the decision of the court is contrary to law.

4th. For errors occur-ing at the trial and duly excepted to by this respondent defendant.

5th. Because this court has no jurisdiction of the subject matter of this action, nor authority of law to hear, try or determine the issues thereof.

6th. Because Chapter 105 of the Session Laws of 1905 of Nebraska is unconstitutional and void, because the same is class or special legislation.

7th. Because said Chapter 105 is repugnant to and in contravention of Article 14 of the Amendments of the Constitution of the United States, in that it attempts to take private property for a private use without due process of law, and denies to this respondent, being a citizen of Nebraska, the equal protection of the laws.

8th. Because said Chapter 105 of the Session Laws of Nebraska of 1905 is in contravention and repugnant to Section 21 of Article 1 of the Constitution of the State of Nebraska, which provides, "the property of no person shall be taken or damaged for public uses without just compensation therefor.

Affidavit record and oral evidence will be used on the hearing of this motion.

WAGGENER, ORR, AND
REAVIS & REAVIS,
Attorneys for Missouri Pacific
Railway Company, Respondent.

And on the 18th day of February, 1907, the following proceedings were had, to wit:

THE STATE OF NEB. *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY.

28 Now on this 18th day of February, 1907, this cause came on to be heard on the motion of Respondent to set aside the judgment of the court herein and for a new trial of said cause.

And after hearing arguments of counsel for the respective parties and the court being fully advised in the premises, it is ordered and adjudged that said motion for a new trial be and the same is hereby overruled to which ruling the respondent excepted.

And afterwards on the 14th day of March, 1907, there was filed in the o-fice of said Clerk a certain Supercedeas Bond in words and figures following to-wit:

In the District Court for Richardson County, Nebraska.

THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA, Relator,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Respondent.

Supercedeas Bond.

Know all men by these presents; That we, The Missouri Pacific Railway Company as principal, and Irvin C. Maust and Albert Maust as sureties are held and firmly bound unto the Farmers' Elevator Company of Strausville, Nebraska, in the sum of Five Hundred Dollars for the payment of which we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas The Missouri Pacific Railway Company has appealed to the Supreme Court of the state of Nebraska from the decree of the District Court in and for Richardson County, Nebraska, in the above entitled suit entered on the 1st day of February, 1907, requiring and commanding the said The Missouri Pacific Railway Company by a *pre*emptory writ of mandamus to forthwith erect equip and maintain a proper
29 switch or side track leading from the res-ondent's main line of railroad to the said relator's elevator which is situate adjacent the right of way of said respondent's railroad at the station of Strausville, Richardson County, Nebraska, which switch or side track shall be of suitable length to approach as near as necessary the said relator's elevator at the said station of Strausville as to enable the said relator to load grain directly from its said elevator into respondent's cars on said switch or side track. Said Court has fixed the amount of a bond to be given for the purpose of super*sea*ding said decree in the sum of $500.

Now therefore, if the said Missouri Pacific Railway Company shall prosecute said appeal without delay and abide by the decree rendered by the Supreme Court in said cause then this obligation to be void and — no effect, otherwise to remain in full force and effect.

THE MISSOURI PACIFIC RAILWAY CO.,
By ISHAM REAVIS, *Att'y for Mo. Pac.*
IRVIN C. MAUST.
ALBERT MAUST.

This bond filed and sureties approved by me this 14th day of March, 1907.

[SEAL.]

CHAS. LOREE,
Clerk Dist. Court.

STATE OF NEBRASKA, *Richardson County, ss:*

I, Chas. Loree, Clerk of the District Court in and for said County do hereby certify that the above and foregoing Application
30 for Writ of Mandamus, Notice, to the M. P. Railway Company, Amended Application for Writ of Mandamus, Exhibits

"A" and "B," Service, Plea in Abatement, Demurrer, Answer, Motion for New Trial, Order Allowing Pre-mptory Writ, All Journal Entries, and Supercedeas Bond, is a true and correct transcript of the original files and records now in this office, in the case of State of Nebraska *Ex Rel.* The Farmers' Elevator Company, of Strausville, Nebraska, *vs.* The Missouri Pacific Railway Company.

Witness my hand and official seal this 21st day of March, A. D. 1907.

Chgs. $5.75.

[SEAL.]

CHAS. LOREE,
Clerk of the District Court.

Endorsed: 15128—State *ex Rel.* Farmers' Elevator Co. *v.* Mo. Pac. Ry. Co.—Transcript.—Supreme Court of Nebraska.—Filed Mar. 26, 1907.—H. C. Lindsay, Clerk.

31 And on the same day, to-wit: March 26, 1907, there was filed in the office of the Clerk of said Supreme Court a certain Bill of Exceptions in the words and figures following, to-wit:

THE STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR CO. OF STRAUSVILLE, NEBR.,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY.

Filed M'ch 19, 1907.

[SEAL.]

CHAS. LOREE,
Clerk Dist. Court.

FALLS CITY, NEBRASKA.

Received these Bill of Exceptions in case of the State of Nebraska *ex Rel.* The Farmers' El. Co. of Strausville *vs.* The Missouri Pacific Railway Co., on March 13th, A. D. 1907. And on this the 18th day of March, A. D. 1907, Return said Bill of Exceptions. Without objections and consent same be signed and allowed but do suggest that on page 6 witness means about Jan'y 1st, A. D. 1905, And also on page 13 he means the First of May, 1905. And also that Exhibit (2) ought to have *wrote* on its face Words "Exhibit (2)."

R. C. JAMES &
C. GILLISPIE,
Att'y- for Plaintiff.

Received this bill of exceptions this 13th day of March, 1907, for examination and amendment.

R. C. JAMES &
C. GILLISPIE,
Attorneys for Plaintiff.

32 Now on this 19th day of March, 1907, we return this bill of exceptions with the following suggestions of amendment. P. C. S. to Question 10. "December" should be stricken out.

Witness means January, 1905, and on p. 13. A. to Question 73. Year should be 1905 and not 1904.

JAMES & GILLISPIE,
Attorneys for Plaintiff.

In the District Court of Richardson County, Nebraska.

THE STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY.

Bill of Exceptions.

Tried before Hon. John B. Raper at Falls City, Nov. 2, 1906.

Appearances.

For plaintiff, C. Gillespie, R. C. James. For defendant, J. W. Orr, Reavis & Reavis.

33 Be it remembered, That this cause came on for hearing before Hon. John B. Raper, one of the judges of said district, at the regular September, 1906, term of the district court held in and for Richardson County, Nebraska, on November 2, 1906; and the parties hereto, to maintain the issues by them joined, introduced and gave to the court the following oral and documentary evidence as is fully set forth in this bill of exceptions.

34 By Mr. ORR: The defendant objects to the introduction of any evidence in this case for the reasons:

First. That this court has no jurisdiction of the subject matter of the action, nor authority of law to hear the trial and determine the issues thereof.

Second. Because the plaintiff has not legal capacity to sue or maintain this action and is not the real party in interest, nor has the state any real interest in this controversy.

Third. Because the petition does not state facts Sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

Overruled.

Exception.

By Mr. JAMES: It is admitted in this case that the elevator of the plaintiff company was built at the *the* said station of Strausville and completed prior to the first day of April 1905.

Mr. F. M. STUMP called by plaintiff, affirmed by the Deputy Clerk:

Examined by Mr. JAMES:

1 Q. Where do you live?
A. I live two miles and a half northwest of the town.
2 Q. You lived out near Strausville do you?
A. Yes sir.
3 Q. Are you connected in any ways with the plaintiff company?
A. Yes sir.
4 Q. What is your business, your position there, if any?
A. I am secretary treasurer of the Farmers' Elevator Co.
35 5. Do you take care of the buying and shipping of grain there?
A. I did until about six weeks ago or two months.
6 Q. When did you first commence handling the elevator at Strausville?
A. About May 1st, a year ago last May.
7 Q. That was directly after the elevator was completed was it?
A. Yes sir, shortly afterwards.
8 Q. Were you the first man to take charge of the elevator after it was completed and in working order?
A. No sir.
9 Q. Who was the first man to take charge of it?
A. Mr. Eli Billman.
10 Q. How long did he work there at the elevator?
A. Well I think he commenced there about December, the first of December 1904. He was working there before the elevator was completed.
11 Q. I am asking about after the elevator was completed. After it was completed and in working order, who was it took charge of the elevator?
A. Mr. Billman.
12 Q. How long did he work after the elevator was completed?
A. He worked about two months.
13 Q. Who succeeded him?
A. I succeeded him.
14 Q. You tell the court just what your duties are there, what you have to do with the elevator?
A. When I was manager I done the business of buying and selling grain.
15 Q. Are you familiar with the capacity of this elevator?
A. I know about what it holds.
16 Q. Tell the court what in your opinion is the capacity of this elevator?

36 By Mr. ORR: Object to that as calling for the opinion of the witness, not the best evidence, incompetent, irrelevant immaterial.
Sustained.

17 Q. What is the capacity of this elevator at Strausville?

By Mr. ORR: Objected to as calling for the opinion of the witness. Sustained.

18 Q. You say you have been working there at this elevator from a month after it was completed until, how long ago?

A. About six weeks or two months ago.

19 Q. How long did you work there?

A. I must have worked there about a year and a half.

Q. Do you know what the dimensions of this elevator are?

A. I don't exactly.

20 Q. Do you know how many bushels of grain at any time you have had in this elevator?

Defendant objects as immaterial. Overruled.

A. I had as near as I can remember now 13000 bushels of corn and some oats, and I didn't have it full.

21 Q. When was that?

A. That was about the last of December som-time.

22 Q. You say 13000 bushels of corn; how many bushels of oats did you have?

A. I had between four and five hundred bushels of oats, five or six hundred.

23 Q. You say the elevator was not full?

A. The elevator was not full.

24 Q. How many more bushels of grain could you have put in the elevator?

Defendant objects as leading, calling for the opinion of the witness. Sustained.

25 Q. How nearly full was that?

Defendant objects as calling for the opinion of the witness.

37 A. I can prove that statement by my daily report.

26 Q. Have you that report here?

A. Not here, it is at the office.

27 Q. How near full was the elevator?

Defendant objects as calling for the opinion of the witness leading, not the best evidence. Sustained.

28 Q. How much space was there yet unfilled in this elevator after you had 13000 bushels of corn and between four and five hundred bushels of oats in the elevator?

By Mr. ORR: Give the feet and inches.

A. I can't do that; I had a hopper there——

Defendant objects unless he gives the dimensions. Overruled.

I had a hopper there that would hold 240 or 250 bushels of grain that was not full; and there is quite a space there in the hallway that could have been filled up and one bin was not full, over the grinder.

29 Q. How large was that bin?

Defendant objects as not the best evidence.

A. I had about 800 bushels in the bin and it would hold about 1200.

By Mr. ORR:

30 Q. There was about 400 bushels capacity left?
A. Yes sir.

By Mr. JAMES:

31 Q. Were there any other apartments there that were not filled?
A. There was not any other bins, but the hall way there could have been filled.

32 Q. How much would the hall way hold?
38 A. It could probably have been fixed to put 100 bushels in it, if we wanted to.

Defendant moves to strike out as not the best evidence, not intended for capacity.

33 Q. Did you ever use this hall way for storage of grain?
A. We have.

By Mr. ORR:

34 Q. When the bins we-e empty?
A. We used it to dump grain in to dry and there was also a bin under the cleaner that holds about 100 or 150 bushels, that I had nothing in.

By Mr. JAMES:

35 Q. Adding all this together how much would the elevator hold?

Defendant objects as not the best evidence. Overruled.

A. That would bring the amount in the neighborhood of 15000 bushels, maybe more, I never figures it up.
36 Q. Can you figure it up?

Defendant objects as not the best evidence. Overruled.

A. The hopper would be two and the other bin that lacked about 400 would be 600 and the hall way there, I said would hold about 1000 bushels, if it was filled up, would be 1600 and that bin under the cleaner would be 100 would be 1700 bushels.
37 Q. Added to the amount you had of oats and corn?
A. I had about 13400 or 13500 of oats and corn, that would make about 15200 bushels, wouldn't it?

Cross-examination by Mr. ORR:

38 Q. How many bins have you got there?
A. Seven bins, besides the hopper and one under the cleaner?
39 Q. You have seven bins besides the hopper and cleaner?
A. And dumps.

40 Q. What are the dimensions of these seven bins?
39 A. I am sure I could not tell you, never measured them.
41 Q. Can you give any idea of what the diemensions are?

A. No, I don't know that I can. If I could remember the size of the main part of the elevator I might have some idea.

42 Q. It would be a poor guess working that way; all this is isn't it?

A. If I was to guess at the size of the bins it would be.

43 Q. The question is whether this is?

A. What; the statement I made before?

44 Q. Yes.

A. I said I had the reports to show.

45 Q. What date was it you had 13000 bushels of grain in there?

A. I think I said about December sometime, last.

46 Q. Can you give it any more accurate than that?

A. No, I don't know that I could.

47 Q. You had exactly 13000 in there?

A. No, I didn't say that?

48 Q. How near 13000?

A. I said about.

49 Q. What do you mean by about?

A. Between 12000 and 13000 bushels, my report will show exactly.

50 Q. You had then between 12000 and 13000 bushels and your report will show exactly; do you know whether it was nearer 12 than 13?

A. No, I don't.

51 Q. I- might have been nearer 12 a good deal than 13 might it not?

A. I don't say; I said about 12 or 13, between 12000 and 13000 bushels.

52 Q. Will you say that it was as many as 12500 bushels?

A. No, I would not like to say positive, unless I had the report.

53 Q. You don't wish the court to understand from the statement that it was exactly 13000 bushels?

40 A. No sir.

54 Q. Nor as much as 13000 bushels?

A. I don't want to make that kind of a statement without my report.

55 Q. What you are stating there is simply a guess of yours, your impression from what you knew?

A. That is just what I can remember from my report.

56 Q. You can't tell whether there was 12000 or 13000?

A. I can swear it was 12000 and over but how much over I could not swear.

57 Q. You would not be willing to swear positively it was 12250 bushels?

A. I can go and get the report.

58 Q. Would you now; you have affirmed to this court you had at one time, about the first of December last, about 13000 bushels in that elevator?

A. Yes sir.

59 Q. Are you willing to say that you had 12250 bushels at that time on oath?

A. No sir.

60 Q. You said you had between 400 and 500 bushels of oats; are you willing to say you had as many as 400 bushels on oath?

A. Well that has been so long I could not state positively; I would like to get my report and go by the report.

61. Q. Then you are simply giving your best guess at it are you?

A. What else could you expect me to do?

62 Q. I didn't expect you to do anything else. You are simply giving your best guess at it at this time?

A. Yes sir.

63 Q. You don't wish to be understood as saying you had 13400 bushels of grain and oats in there at any one time do you?

A. If I knew positive I would not need to refer to my report.

41

64 Q. But you don't know positively do you?

A. No, not exactly.

65 Q. And you don't wish to say that do you?

A. I am not making that kind of statement.

66 Q. So you are not wisllling to swear positively you had 1200 bushels of grain in there would you?

A. Yes, as near as I knew.

67 Q. I am not asking you to make any excuses about it; as an honest man you would not go on the witness stand and state positively you had 12250 bushels there at that time?

A. No, because I don't remember.

68 Q. So your whole testimony here is made up of impressions and not based upon your accurate knowledge of the facts, isn't that so?

A. I don't know accurate, that is the reason I don't testify positively.

69 Q. I ask you again for that reason. What you have stated to the court is based on your impression or best guess from your knowledge of the situation?

A. I am just making a kind of estimate of what I can remember; if I knew exactly I would state exactly.

70 Q. You don't wish to be understood as stating the figures you gave are accurate?

A. No sir.

Defendant moves to strike out the testimony so far as the bushels given in the elevator are concerned or the capacity for the reason it is merely guess work of the witness. Overruled. Exception.

71 Q. When did you say you commenced the office of secretary of this company and treasurer?

A. When the company was incorporated.

42

72 Q. In about 1904 sometime?

A. No sir, I didn't state that.

73 Q. When was it?

A. I said I was manager about the first of May 1905.

74 Q. From that time up until when?

A. Until about the first of September.

75 Q. This year.

A. Yes sir.

76 Q. As manager what were your duties?
A. Buying and selling grain.
77 Q. Who composed the membership of this farmers' grain elevator company?
A. Thirty-one of us farmers in the neighborhood of Strausville.
78 Q. Do all these farmers bring their grain to this elevator?
A. Principally so; unless they sell to feeders.
79 Q. If they have it to elevate they bring it to your elevator?
A. Yes sir.
80 Q. Unless they sell it locally they bring it there and put it in the elevator to sell, is that right?
A. Yes; they don't bring it and put it in the elevator to sell. I buy it outright.
81 Q. You buy it outright?
A. Yes sir.
82 Q. Your patrons are members of the corporation?
A. Yes, and a lot besides.
83 Q. Where do you ship this grain to?
A. We sell lots of it there on the track, some we consign and some we sell.
43 84 Q. My question is where do you ship to, where do you send it to?
A. We ship south.
85 Q. Where to?
A. To Atchison some and Saint Louis some and Kansas City.
86 Q. Atchison Kansas, St. Louis and Kansas City, Mo. isn't it?
A. Yes sir.
87 Q. Did you have the exclusive management of that elevator from the time you began until you quit?
A. There was a board of directors or trustees.
88 Q. Who composed the board of directors or trustees?
A. Part of the company, part of the stockholders.
89 Q. Where was this elevator erected in reference to the right of way of the defendant company, do you know?
A. I don't understand your question.
90 Q. Question read.
A. What do you mean by the question.
91 Q. Is it north or south or east or west of the railroad?
A. It is south.
92 Q. It is south of the railroad?
A. That is the railroad angles a little, it is on the south side.
93 Q. The railroad runs in a northwester and southeast direction there?
A. Yes sir.
94 Q. It is on the southwest side of the railroad?
A. Yes sir.
95 Q. Is there a public highway crossin- the dump at that point or near that point?
A. There is a public road crosses the track there. Yes sir.
96 Q. Where in reference to your elevator?

A. We are on the east side of the public road.
44 97 Q. You are on the east side of the public road?
A. Yes sir.
98 Q. Are there any other elevators at that point?
A. Yes sir.
99 Q. Where are they?
A. That is west of the public road.
100 Q. How far west of the public road?
A. I should judge about 30 rods, maybe less.
101 Q. Where is the depot, in reference to the public road?
A. It is close to the other elevator, that is the site, there is no depot there.
102 Q. That makes it west of the public road?
A. Yes sir.
103 Q. Is there a spur or switch track there?
A. Yes sir.
104 Q. Where does that spur track or switch track commence and end, in reference to the public road east or west of it?
A. West of it.
105 Q. It is all located west of the public road?
A. Yes sir.
106 Q. Your elevator is east of the public road?
A. Yes sir.
107 Q. What is the general character of the ground there, in reference to being level, up grade or down grade, from the switch to your elevator?
A. It is apparently level, may be a little lower west.
108 Q. And raises from the track toward your elevator?
A. I guess I got that wrong, the cars run east this way so it is lowest this way.
109 Q. Then it would be down grade from the switch?
A. To the elevator.
45 110 Q. How far west of the west side of the public road is the east end of the switch?
A. I should judge it was 100 feet, may be not so much.
111 Q. How far east of the east side of that road is your elevator?
A. I should judge about 100 feet.
112 Q. Do you know where the railroad right of way line is there between the tracks and your elevator?
A. I think I do.
113 Q. How far is it from your elevator?
A. About a foot or fifteen inches.
114 Q. That is the southwestern line?
A. Yes sir.
115 Q. How many elevators are there now?
A. One.
116 Q. Do you know the capacity of that elevator?
A. I don't.
117 Q. Is it as large as yours?
A. I think not.
118 Q. Do you know?
A. I don't.

119 Q. Give your best opinion as to the relative capacity of the two elevators?
A. I think I heard the other fellows say about 10000 bushels.
120 Q. How much of a town is Strausville?
A. It has only three or four houses.
121 Q. Any stores?
A. Yes sir.
46 122 Q. How many?
A. One.
123 Q. General store?
A. Yes sir.
124 Q. Has it any post offices?
A. Yes sir.
125 Q. What other business is done there?
A. There is a blacksmith shop.
126 Q. Church?
A. No.
127 Q. Schools?
A. No sir.
128 Q. Any depot there; does the Missouri Pacific have a depot there?
A. No sir.
129 Q. Station?
A. A station, you can get off and on there.
130 Q. Cars stop there?
A. Yes sir.
131 Q. Has it a depot building?
A. No sir.
132 Q. What is y-ur closest town south east of there?
A. Falls City.
133 Q. What is the size of Falls City in a general way?
A. I think the papers give about 5000.
134 Q. Any elevators at Falls City?
A. Yes sir.
135 Q. How many?
A. Two.
136 Q. Any more than two?
46½ A. I think that is all.
137 Q. On what road are they?
A. One on the Missouri Pacific and one on the B. & M.
138 Q. Two railroads run into Falls City?
A. Yes sir.
139 Q. What is your nearest station in a north west direction?
A. Verdon.
140 Q. How large a place is Verdon?
A. I am sure I could not say, probably 1000 or 1500.
141 Q. How far is it from Strausville?
A. I judge about five miles or six.
142 Q. Is it as far as that?
A. About that.
143 Q. How many railroads go to Verdon?
A. Two.

144 Q. Burlington and Missouri Pacific?
A. Yes sir.
145 Q. How many elevators have they there?
A. Two.
146 Q. One on each line?
A. Yes sir.
147 Q. All kinds of business done at Verdon?
A. I think so.
148 Q. It has school houses and churches and business houses?
A. Yes sir.
149 Q. What is your nearest town in any other direction than those you named?
A. Salem is south west.
150 Q. How far?
A. Seven or seven and a half.
151 Q. On what line of *raod*?
A. B. & M.
47 152 Q. How many elevators?
A. Two I think.
153 Q. How large a place is Salem?
A. Not quite as large as Verdon or the same size.
154 Q. In the neighborhood of 1000 inhabitants?
A. Yes, sir, I judge so.
155 Q. The *twon* of Salem has several stores?
A. Yes sir.
156 Q. And does a general trading business?
A. I think so.
157 Q. Has churches and schools?
A. Yes sir.
158 Q. What other town in the opposite direction, do you have, what is the nearest town?
A. We have Shubert north about ten miles.
159 Q. What line of *raod* is that on?
A. On the B. & M.
160 Q. Has that any elevators?
A. I think so.
161 Q. How large a town is Shubert?
A. I don't know, it has been a long time since I have been there.
162 Q. Have you any town north east?
A. No railroad town.
163 Q. How is Dawson, how far from your place?
A. It must be ten or twelve miles.
164 Q. What sized town is Dawson, about?
A. It is a little smaller than Verdon I should judge.
165 Q. How many railroads are there?
A. One.
166 Q. Does it do a general business?
A. I think so.
48 167 Q. Do you know how many elevators they have there?
A. I don't.
168 Q. It has a number of stores?

A. I think so.

169 Q. Schools and churches?

A. Yes sir.

170 Q. Are there any other towns within a radius of ten miles of Strausville that you have not mentioned?

A. I think not, no railroad towns.

171 Q. Any towns at which there are grain elevators?

A. No sir.

Redirect examination by Mr. JAMES:

172 Q. Are you acquainted with the neighborhood around Strausville in reference to agriculture and production of grain?

A. Yes sir.

173 Q. What kind of country is it?

A. It is a pretty good corn and wheat country.

174 Q. Do they raise lots of corn around Strausville?

A. Yes sir.

175 Q. You may state whether or not Strausville is a good grain market.

A. It is.

176 Q. Have you had a good deal of grain business since you have been located there?

Defendant objects as leading, suggestive. Sustained.

177 Q. Tell the court the nature of the grain business since you have been located there, whether it has been good or bad?

Defendant objects as calling for a conclusion. Sustained.

178 Q. Do you know how many bushels of grain you have handled per month at that elevator?

A. No, I don't but I can tell about how many cars we
49 shipped since last December, I looked over the book some time ago.

179 Q. How many cars of grain have you shipped since last December?

A. I was looking over the books when I quit; I think we shipped about 50 cars since the first of December 1905, and probably ten or twelve cars since, making about 60 or 65 cars.

180 Q. Have you been to any disadvantage in regard to your location?

Defendant objects as leading and suggestive, calling for the opinion of the witness. Sustained. Exception.

181 Q. You may tell the court the manner in which you loaded your grain from the elevator onto the cars?

A. Well we ran it into a wagon from the scales and then shoveled it into the cars.

182 Q. How many extra men does that require to do that work; I mean men you would not need if you could load it directly from the elevator?

Defend-nt objects as calling for the opinion of the witness, overruled exception.

A. In warm weather we use four; usually three when the weather is cool. It takes an extra man to shovel back in the car.

183 Q. Describe the country in reference to farmers going to Strausville; what advantage if any in regard to crossing any railroad in getting to Strausville; what scope of country can go to Strausville without crossing a railroad?

Defendant objects as leading, suggestive. Overruled. Exception.

A. There is quite a lot of road to go over without crossing any railroad, especially from the north; down hill all the way, it brings nearly all that grain to Strausville.

184 Q. Put it in the record so the court can understand what scope of -untry; describe it, how far north on a straight -line
50 from Strausville until you strike the railroad at the north?

A. You strike the river first.

185 Q. If you was to go straight north you would have to go 23 miles?

A. I expect.

186 Q. How far south would you go before you struck the railroad, how many miles?

A. About four and a half or five.

187 Q. Now take a direction due east from Strausville before the farmers would have to cross a railroad to go to Strausville?

A. You would go about 12 or 14 miles and then you would be to the river.

188 Q. Now describe to the court how wide a scope of territory in the count-y is tributary naturally to that Strausville station, as near as you can judge from your experience in the country?

Defendant objects as incompetent, irrelevant immaterial, calling for the opinion of the witness. Overruled. Excepti-n.

A. About eight miles -orth and ten or twelve miles north east and east and three or four miles west and a couple of miles south.

189 Q. Now describe to the court the character of the country as you de-cribe and as a grain producing country; whether you ever saw any better and where was it you saw any better country for grain?

Defendant objects as incompetent, irrelevant immaterial, suggestive, calling for the opinion. Sustained.

190 Q. State the character of the country as a grain producing country?

A. Well it is a good grain producing country, I don't think there is any better.

By Mr. ORR:

191 Q. You say that it is ten miles due east from Strausville to the river; do you mean by that that the entire ten miles is tributary to Strausville as a grain market?

A. No sir.

51 192 Q. You have already stated that Falls City was to the south east?

A. South east.

193 Q. And Rulo east?

A. Yes sir.

194 Q. Arago village east?

A. That is no railroad town.

195 Q. Did you ever get any grain in your experience from Arago township?

A. Well we get grain from very near up there.

196 Q. Arago township is straight east of you?

A. Yes sir we get lots of grain from Arago township.

197 Q. Who did you ever get any from.

A. I don't know as I can remember any names, but there is quite a little grain comes from Arago township.

198 Q. Can you think of a single customer, a single farmer living in Arago township that has brought grain to Strausville to sell?

A. Yes sir.

199 Q. Who is it?

A. There is Battrells.

200 Q. Where do they live?

A. Half a mile north a-d three and a half east of Strausville; they live four miles and a half east of Strausville.

201 Q. Is Strausville in Ohio township?

A. Yes sir.

202 Q. On the west line?

A. No it is about the middle.

203 Q. Do you mean e-st and west?

A. Yes sir.

204 Q. You say that you have had shippers as far as the west line of Arago township?

52 A. No, I didn't say I had, I say they haul grain to Strausville.

205 Q. And ship it on your elevator?

A. No, they didn't haul to me; you wanted to know if any body hauled.

206 Q. I mean for your elevator?

A. No, I don't remember any body now, but these parties hauled to Strausville.

207 Q. They would be about as near Falls City as they would be to Strausville?

A. Yes sir, lots of parties nearer to Falls City haul to Strausville.

208 Q. They would have the same facilities at Falls City and about the same distance?

A. It is a little closer to Strausville.

209 Q. And a better road?

A. Where.

210 Q. From the west line of Arago township to Falls City?

A. No sir. No they are closer to Strausville a little.

211 Q. They are closer?

A. Yes sir.

212 Q. Then they can't be more than three and a half — of Strausville, can they?

A. Why.

213 Q. Do you know where Half Breed Creek is?
A. Yes sir.
214 Q. Do you know where they live in refe-ence to that?
A. One lives on the other side of Half Breed and one on this side.
215 Q. That would be the west line of Arago township?
A. That would be clear to the west line.
216 Q. Do you k-ow of anyone else than those you named
53 bringing grain to Strausville? From the Arago Township, to sell?
A. Yes sir.
217 Q. Who?
A. Mr. Zorn has hauled grain to me.
218 Q. Where does he live?
A. He lives two miles north of Strausville and four miles east.
219 Q. Is he a member of your as-ociation?
A. No sir.
220 Q. Two and a half miles north and four east, is that right?
A. No, he lives two miles north and four east.
221 Q. He lives on the west line of Arago?
A. He lives just across the township line I think.
222 Q. Anyone else you know of hauling here from that point?
A. Neimeyer was on the line.
223 Q. That is on the line between Ohio and Arago?
A. Yes sir.
224 Q. How far north of Strausville have you had customers come from?
A. About six miles or six and a half.
225 Q. That would take it into the south line of Barada township?
A. Yes sir, I think so.
226 Q. Do these persons who hauled from the south line of Barada township; were they connected with your corporation?
A. Not all of them.
227 Q. Are they generally?
A. No sir.
228 Q. Did you purchase this grain or did the other elevator purchase it?
A. We purchased it.
54 229 Q. You don't mean to say any of the grain was hauled as far as eight miles east of Strausville to Strausville, do -ou?
A. No sir, I didn't say that.
230 Q. Nor as far as twenty five miles north?
A. No sir, I didn't say that.
231 Q. Or twelve miles north?
A. No sir, I didn't say that. But we did but grain six and a half or seven, I don't know just how far it is up there.
232 Q. Five miles south would be considerably nearer F-lls City than Strausville would not it?
A. Yes sir.

233 Q. Five miles south west would be on to Salem or at least in the neighborhood of Salem?

A. In the neighborhood, but we buy grain within three quarters of a mile of Salem.

234 Q. There are elevators at Salem?

A. Yes sir.

235 Q. Seven miles west; did you ever get any as far as seven miles west?

A. No sir.

Witness excused.

Mr. H. J. PRITCHARD called by the plaintiff, affirmed by the deputy clerk.

Examined by Mr. JAMES:

236 Q. Where do you live?

A. In Ohio township, Richardson County Nebraska.

237 Q. What is your relation to the Strausville Elevator Co.?

A. I am a member of the association, president of the board of directors.

55 238 Q. Do you know when this elevator was incorporated?

A. The first of April 1906.

239 Q. Y-u say you are a member of the board of directors?

A. Yes sir.

240 Q. Do you know whether or not notice was ever served upon the Missouri Pacific Railway Co. to give a sidetrack at this elevator?

A. Yes sir.

241 Q. When was that notice served, if you remember?

Defendant objects as incompetent, irrelevant immaterial. Not the best e-idence. Sustained.

Plaintiff offers in evidence the notice served on the Missouri Pacific Railrway by the Farmers' Elevator Co. and served by the sheriff of the county on the 8th of September 1906 upon the Missouri Pacific Railway.

Defendant objects as not the best evidence. Sustained.

Witness excused.

Mr. W. T. FENTON called by Plaintiff, sworn by the Court.

Examined by Mr. JAMES:

242 Q. You are the sheriff of Richardson County Nebraska?

A. Yes sir.

243 Q. I will ask you whether or not on or about the 8th day of September 1906 you served upon the Missouri Pacific Railway Co. a notice given by the Farmers' Elevator Co.?

A. Yes sir.

244 Q. (Handing witness Plaintiff's Exhibit 1.) I will ask you if that is the notice you served?

A. Yes sir.

Plaintiff offers in evidence e-hibit 1. Notice.

56 By Mr. ORR:

245 Q. You say this is the notice you served, is this the notice or a copy?

A. It is a copy, a certified copy.

Defendant moves to strike out the answer of the witness which says that the notice produced and shown to witness is the n-tice served on the Missouri Pacific Railway Co., for the reason the witness has testified since that the notice shown him is a copy and not the original served upon the Missouri Pacific and for that reason it is not the best evidence. Overruled. Exception.

Defendant objects to the introduction in evidence of the notice for the reason shown by the testimony it is not the original notice and there is no effort made to produce the best evidence. Overruled. Exception.

By Mr. JAMES: This isn't the notice, we will have to find the right one.

246 Q. I will ask you whether or not on or about the 31st of May 1906 you served a notice given to you by the Farmers' Elevator Co. upon the Missouri Pacific Railway in this city?

Defendant objects as calling for the opinion of the witness. Sustained.

247 Q. Handing witness Exhibit 2, I will ask you if you served a certified copy of that?

A. I don't know if I served it for the Farmers' Elevator Co.

248 Q. I will ask you if you served a certified copy of that upon the Missouri Pacific Railway Co.?

A. Yes sir.

Plaintiff offers in evidence Exhibit 2.

57 By Mr. ORR:

249 Q. Did you serve a certified copy of it or did you serve the original of this?

A. I served a certified copy.

250 Q. Did you make the copy?

A. I think the copy was given to me; a copy of that and I read it over and served it.

251 Q. Do you know whether you served the original or the copy?

A. I served the copy that was made; it was marked copy, I was told which on- was the copy.

252 Q. Y-u served the copy and not the original?

A. Yes sir.

253 Q. So far as you know?

A. That is my understanding, that I served the copy. I served the one that was supposed to be the copy.

254 Q. Who signed the one that was served where it says Farmers' Elevator Co. by H. J. Pritchard, President; who signed that H. J. Prichard, President, did you?

A. No sir.

255 Q. Was it signed when you got it?

A. I think it was, if I remember right, I didn't sign that.
256 Q. You didn't sign any paper that you served did you?
A. Yes sir.
257 Q. You simply signed the statement that you served it, you didn't sign the notice?
A. Yes I signed the statement that it was a true and certified copy of the original then in my hands for service.
258 Q. You served the original and this is the copy?
A. It was the copy I served.

Defendant obj-cts to the introduction of plaintiff's Exhibit 2 for the reason the same is not the best evidence, incompetent, irrelevant immaterial and does not purport to be an application or no-
58 tice which was *was* served upon the defendant company but only a copy of the notice which was served upon the defendant company and is not a compliance with the statute and not the best evidence and no effort having been made to produce the best evidence. Sustained.

Witness excused.

Mr. H. J. PRICHARD recalled by the pl-intiff.

Examined by Mr. JAMES:

259 Q. Handing witness Exhibit 2, I will ask you if that is your signature to that?
A. Yes sir.
260 Q. You signed that?
A. Yes sir.
261 Q. Do you remember the time you signed that application?
A. Yes sir.
262 Q. How -any did you sign?
A. I signed two.
263 Q. Did you read them both over?
A. Yes sir.
264 Q. Were they both exactly alike, so far as you knew?

Defendant objects — not the best evidence, leading, calling for the opinion of the witness. Overruled. Exception.
A. Yes sir.
265 Q. You signed both those notices did you?

Defendant objects as leading, suggestive having been gone over. Sustained.

266 Q. Did you notice whether or not one was marked and
59 certified on one of the notices *s*that it was an exact copy of the other, did you notice that at the time you signed them?
A. I can't remember.
267 Q. You remember signing two n-tices?
A. I remember signing two notices; one was an original and one was a copy.

By Mr. ORR:

268 Q. Calling your attention to exhibit 2, which is tha- the original or the copy?

A. The original or the copy, I could not tell in regard to that.

Plaintiff offers in evidence the notice of the application, exhibit 2.

Defendant objects for the reason it is incompetent irrelevant immaterial, is not the best evidence not tending to prove or disprove any issue in the case, and no effort having been made to produce the original and best evidence. Overruled. Exception.

By Mr. JAMES:

269 Q. Handing you Plaintiff's Exhibit 3, I will ask you if that is your signature?

A. Yes sir.

270 Q. Do you remember the time you signed that?

A. Yes sir.

271 Q. How many did you sign?

A. I signed two.

272 Q. Were they exactly alike?

A. No answer.

273 Q. Did you read over this notice?

A. Yes sir.

274 Q. Were they exactly alike?

60 Defendant objects as not the best evidence, notice being the best evidence; the question is leading and calling for th- opinion of the witness. Overruled. Exception.

A. Yes sir.

Plaintiff offers in evidence Exhibit 3.

Defendant objects for the reason it is incompetent, irr-levant immaterial, not the best evidence in the case; the original being the best evidence; also because it does not tend to prove or disprove any issue in the case and witness who signed the statements contained in exhibit 3 is present in court and is the best evidence -n the subject. Sustained.

Defendant ad-its that if J. E. McFarland were present he would testify as stated on the back of the latter; this is done for the purpose of saving time and sending out for Mr. McFarland.

By Mr. ORR: For the purpose of saving time and preventing the necessity of getting Mr. McFarland here as a witness, respondent admits that if present in court J. E. McFarland would testify as follows. "Received this written application of the 2nd day of August 1906 and served the same upon the within named Missouri Pacific Railway Company by delivering a true and certified copy of the within application to J. B. Varner, station agent of the Missouri Pacific Railway company at Falls City Neb. All done at Falls City Richardson County Nebraska, on the 2nd of August, 1906.

61 J. E. McFarland, constable."

Plaintiff offers in evidence exhibit 3.

Defendant objects to exhibit 3 for the reason it is incompetent;

irrelevant, immaterial, not the best evidence of the matters and things contained therein and isn't the paper which was served upon the defendant company and does not purport to be the paper served upon the defendant company and also because H. J. Prichard, president of the Farmers' Elevator Co. of Strausville Neb. is present in court and on the witness stand and his te-timony as to the matters contained in exhibit 3 is better evidence than the statements contained in the paper. No effort or demand having been made upon the defendant company to produce the paper which was served upon it of which exhibit 3 purports to be a copy or duplicate of the original. Overruled. Exception.

275 Q. Do you know how near the right of way of the Missouri Pacific railway this elevator is built?

A. I don't know exact.

276 Q. You can approximate to it?

A. Yes sir.

277 Q. Approximate it the best you can?

A. We made it just as near to it as we could get, probably a foot.

278 Q. You are sure it is within five feet of the line of the right of way to the best of your knowledge?

A. Yes sir.

Witness excused.

By Mr. GILLESPIE: We ask the privilege of introducing other witnesses if we think it becomes necessary.

By the COURT: You may recall Mr. Stump.

62 Plaintiff rests.

By Mr. ORR: Defendant moves the court for judgment in its favor on the pleadings and proofs for the reason plaintiff has not legal capacity to sue or maintain this action. 2. B-cause this court has no jurisdiction of the subject matter of the action nor authority of law to maintain the action. 3. By the undisputed evidence in this case plaintiff is not entitled to recover and the defendant is entitled to recover.

Overruled. Exception.

Mr. J. W. ORR called by the Defendant, sworn by Deputy Clerk.

Examined by Mr. C. F. REAVIS:

279 Q. Where do you live?

A. Atchison Kansas.

280 Q. State your name?

A. J. W. Orr.

281 Q. What is your occupation?

A. I am attorney for the Missouri Pacific Railway.

282 Q. How long have you been connected with the legal department of the Missouri Pacific?

A. Twenty years.

283 Q. Are you acquainted with the territory covered by the Missouri Pacific Railway Co.?

A. Yes sir.

284 Q. You may state what territory is covered by that road?

A. The Missouri Pacific Railway Co., defendant in this action is a railway corporation organized under the laws of the state of Missouri and is doing business as such corporation in the states of Nebraska, Kansas, Missouri, Indian Territory, Arkansas, Lou-
63 isiana, Texas and Colorado and is engaged as such railway company in the carriage of freight and passengers and is engaged in interstate commerce between the states named.

[REAVIS]*

By Mr. [JAMES]:*

285 Q. Do you know whether or not the notice was served on your company for a site on your right of way at Strausville?

Defen-ant objects as not proper cross examination. Sustained.

Witness excused.

Mr. A. W. COOMBS: called by defendant, sworn by deputy clerk.

Examined by Mr. ORR:

286 Q. What is your n-me?

A. A. W. Coombs.

287 Q. Where do you reside?

A. Omaha.

288 Q. What is your occupation?

A. Assistant engineer of the Omaha division.

289 Q. Is Strausville, Richardson County Neb. in your territory?

A. Yes sir.

290 Q. Have you recently visited the station of Strausville for the purpose of ascertaining the location of the tracks and the location of the elevators etc. at that point?

A. Yes sir.

291 Q. How recently?

A. Yesterday.

292 Q. As a civil engin*n*er and assistant engin*n*er of the Missouri Pacific Railway Co. it is part of your duty to make estimates of the cost of construction?

A. Yes sir.

293 Q. Did you at your recent visit to Strausville discover
64 the location of the Farmers' Elevator Co.?

A. Yes sir.

294 Q. Is there any other elevator there at Strausville, besides this one?

A. There is.

295 Q. Is there a wagon road, public highway crossing the tracks of the Missouri Pacific Railway at or near the sta-ion of Strausville?

A. There is.

296 Q. Where in reference to these two elevators does that wagon road go?

[*Words enclosed in brackets erased in copy.]

A. Between the two.
297 Q. Which is east and which is west of the road?
A. The Farmers' Elevator is east of the road.
298 Q. The other is west?
A. Yes sir.
299 Q. Does the road run due east and west?
A. The railroad.
300 Q. Yes.
A. The railroad runs south east and north west.
301 Q. Is there a switch track at Strausville?
A. There is.
302 Q. Where is that in reference to the public road?
A. It is west of the public road.
303 Q. All west?
A. All west.
304 Q. It does not cross the road?
A. No.
305 Q. Now if the track was constructed from the present switch track to the Farmers' Elevator, which is situated there, you may state whether or not it would be necessary to cross this wagon road?
A. It would be necessary.
306 Q. Did you ascertain whether the territory there was level or up or down grade from the switch track to the Farmers' Elevator?
A. Yes sir.
65 307 Q. Which is it?
A. It is below the grade of the road.
308 Q. It would be necessary to make a fill?
A. Yes sir.
309 Q. What distance would it be necessary to construct the track from the tracks as at present located, so as to come within loading distance of the Farmers' Elevator as it is now located and sufficient distance beyond to enable it to do an elevating business.

Plaintiff objects as incompetent, irrelevant immaterial. Calling for the conclusion of the witness. Overruled.

A. It would be necessary to build 960 feet of new track.
310 Q. Did you make any estimate in your capacity as assistant engineer of the cost of constructing that track?
A. Yes sir.
311 Q. You may state what it would cost to construct such a track in order to accommodate the Farmers' Elevator company in such a way as to enable them to do an elevating business from that track?

Plaintiff objects as incompetent, irrelevant immaterial, tending to prove no issue in this case, not proper to be introduced in this case. Overruled. Exception.

A. It would cost $1732.
312 Q. Now describe to the court in a general way what expense enters into that estimate of the construction work and material?
A. The present spur to the elevator is entirely west of this road.
313 Q. The wagon road?

A. Yes. From the eastern switch where it comes into the main line at the eastern end would have to be transferred 960 feet down the track and that 960 feet filled in with new track and to bring it up to grade it is from two to three feet of a fill, necessary, that entire distance.

66 314 Q. Now in constructing the switch you may state whether or not it would be necessary to cross the public highway?

A. It would.

315 Q. And in serving this elevator company you may state whether it would be necessary in the movement of engines and cars to constantly and frequently cross this highway?

A. It would be necessary.

316 Q. Did you make any measurements of the elevator for the purpose of ascertaining its utmost capacity?

A. I did.

317 Q. Do you know from measurements the actual utmost capacity of the elevator?

Plaintiff objects as witness has not shown himself competent to testify to capacity. Overruled.

A. Yes sir.

318 Q. You may state what is the utmost actual capacity of the Farmers' Elevator as it is now constructed at Strausville.

A. 14800 bushels.

Cross-examination by Mr. GILLESPIE:

319 Q. How long have you been in the employ of this road?

A. Three weeks.

320 Q. They sent you down here about your first business you had for them, to make this survey?

A. No, I have made several other surveys.

321 Q. What experience did you have in actual work before you came to the railroad company?

A. I was with the Pennsylvania railroad.

67 322 Q. You state to the court that it is impossible to build a switch there without building it 960 feet long?

A. That is what would be necessary.

323 Q. You say that is the result of your survey?

A. Yes sir.

324 Q. Now suppose the elevator was moved across the track and set by the side of the other elevator, what would be the cost to the railroad company?

Defendant objects as no- proper cross examination. Overruled. Exception.

A. You mean to move it across the track; they are both on the same side of the Missouri Pacific main line track.

325 Q. Suppose the elevator was moved up to the side of the present elevator you have got a track to, what cost would it be to the railroad company to furnish track to that elevator?

Defendant objects as immaterial, not within the issues. Overruled. Exception.

A. I can't answer what the cost would be.

326 Q. Give us an idea about it?

A. I can't answer that.

327 Q. You can't tell the court a thing about that, you don't know anything about it?

A. I can't answer that.

328 Q. You spoke about a switch running, if built to the present locality of the elevator, running across the public road; isn't that the condition of the majority of these switches of elevators in this case?

Defendant objects as immaterial, not within the issues of the case; calling for the opinion of the witness without any foundation, no proper cross-examination. Overruled. Exception.

A. I can't tell what the general rule has been all over the country.

68 329 Q. Did you ever see a switch at a depot that ran across a public road?

A. I have seen them.

330 Q. How many do you call to mind having seen?

Defendant objects as immaterial, not proper cross-examination. Sustained.

331 Q. You say you have seen some switches that ran across public roads?

Defendant objects as a repetition.

A. I have.

332 Q. A switch for that kind of an elevator, doing the business it has apparently done, running across the public road, would not be a great inconvenience to the public would it?

Defendant objects — calling for a conclusion and opinion of the witness. Overruled. Exception.

A. I can't tell that until I know; I don't know how much the road is used. I don't know anything about the traffic there.

333 Q. There is a station there?

A. Yes sir.

334 Q. There is an elevator there?

A. Yes sir.

335 Q. The railroad has a station agent there hasn't it?

A. It has.

336 Q. It appears to be a pretty fair farming country around that station as far as you observed?

Defendant objects as not proper cross examination. Sustained.

69 337 Q. Now you say you measured the capacity of the elevator and you made the capacity how much?

A. 14,800.

338 Q. That can be put in the elevator?

A. Yes sir.

339 Q. Tell the court whether you measured the hall way there as part of the grain capacity of the elevator?
A. The hall way?
340 Q. Yes.
A. I don't understand what you mean by hallway.
341 Q. Tell the court what part of that grain elevator; have you got your plat with you that you measured?
A. Of what?
342 Q. The figures you made?
A. No, not the inside dimensions.
343 Q. Can you tell the court item by item what you did measure?
A. No.
344 Q. If you left out anything your papers would not show that?
A. No.
345 Q. Did you bring your papers with you?
A. I have the papers that gave me the total in cubic feet and the change from cubic feet to bushels.
346 Q. Did you measure for cubic feet?
A. I did.
347 Q. Did you figure that brought it down to 14,800 bushels?
A. I did.
348 Q. In making that do you remember using the hall way at all?
A. I wish you would define that hall way.
70 349 Q. The witness has been on the stand and defined it; didn't you hear him?
A. No. sir.
350 Q. You just measured the bins only?
A. I measured the bins, yes sir.
351 Q. That walk way space between these bins you didn't measure that?
A. No sir.
352 Q. You got probably a fair idea of what that hall way is, if it could be used for grain what the hallway would hold?
A. Yes sir.
353 Q. Now tell the court what that would be to the best of your knowledge from what you observed there?
A. No answe-.

By Mr. ORR:

354 Q. Do you remember the dimensions of the hall?
A. No.

Defendant objects to the question. Overruled.

By Mr. GILLESPIE:

355 Q. Question read.
A. I can't answer it.
356 Q. Do you k-ow how long that hall way you passed through?
A. No.
357 Q. If it is the whole length of the building and eight feet wide?

A. I don't know.

358 Q. Have you got your paper with you you made the estimate on?

A. I have.

359 Q. Let us have them?

A. Witness does so.

360 Q. I understood you to say you figured the capacity of the elevator was 14,800 bushels?

A. Yes sir.

361 Q. I want to ask you if you figured what we call the hall way space eight feet wide, twenty four feet long and eight feet high?

A. That space eight by eight.

71 362 Q. It is a hall way they call it?

A. I know the space you mean.

363 Q. Twenty four feet long eight feet high and eight feet wide, did you figure that in making up the amount?

A. I didn't.

364 Q. Now you know how to figure the number of bushels that capacity would contain; I will ask you to state to the court; take a pencil and paper and figure.

A. 1,234 bushels.

365 Q. Now did you figure the drive way?

A. I didn't.

366 Q. The drive way is ten feet wide, 30 feet long and five feet high, will you figure that.

A. No answer.

By the COURT:

367 Q. Is the drive way enclosed?

A. No sir, it is open at b-th ends.

By Mr. GILLESPIE:

368 Q. Will you figure it up.

A. 1,205 bushels.

369 Q. I will ask y-u if you figured the bin that was under the grinder?

A. I did.

370 Q. Did you figure in the dumps?

A. I did.

371 Q. You figured the bin under the floor; do you remember figuring both of them under the grinder?

A. Yes sir.

By Mr. JAMES:

372 Q. Do you think it is necessary to build that track clear across the road?

Defendant objects to two counsel examining the witness. Sustained.

By Mr. GILLESPIE:

373 Q. In making the estimate of 960 feet did you go to
72 the extreme end of the elevator or did you bring the track up to the first line of the elevator?

A. What do you mean?

374 Q. Did you commence where the track left off to go to the elevator and go to the elevator at the nearest point of approach?

A. Yes sir right from where the present switch goes on the straight track again from there over to where she can get in on the main line again.

375 Q. Could not you have found a place on the track nearer to go to the elevator and how much nearer.

A. The only way would be to get in two switch points and would have been within three feet of each other; it would have been necessary to install two new frogs or switches, which would have increased the cost.

376 Q. How far is the nearest point from the other elevator to the sidetrack that is there now?

A. The elevator, that is from the main line?

By Mr. ORR:

377 Q. How far is the elevator that is located on the switch track from that track?

A. No answer.

By Mr. GILLESPIE:

378 Q. How far is it from the elevator, that is the track?

A. 660 feet to bring it on a tangent.

379 Q. You don't claim that is the nearest point of approach?

A. That is the only way we can bring it from that distance down that track.

73 380 Q. Is it necessary to build a sidetrack west you speak of, for the new elevator?

A. Yes sir.

381 Q. Absol-tely necessary, you could not get along without it?

A. Could not get along without it.

382 Q. Can you tell the court how near this elevator in controversy is to your right of way?

A. Between forty and fifty feet: To our right of way?

383 Q. Yes, to the right of way?

A. I don't know the limits of the right of way at Strausville.

384 Q. You don't know them?

A. No sir.

385 Q. When you went out to survey they didn't give you any plat of the road at all?

A. No answer.

386 Q. Tell the court how near the present elevator is to the main line of the rialroad at the nearest point?

A. About 45 feet.

387 Q. Now tell the court how near is the other elevator to the main line of the track?

A. About the same distance.

388 Q. Is it not a fact that the ground is lower at this elevator than at the other elevator. I am speaking of the elevator that has the track, I call it the other elevator. The elevator in controversy how far is that in height*h* above this elevator not in controversy.

A. About two feet.

389 Q. You mean the Maust Elevator is two feet lower than our elevator?

A. No, I mean the reverse.

74 390 Q. You mean our elevator is two feet lower than the Maust elevator?

A. The ground level you are talking about?

391 Q. Yes.

A. The elevator in question is two feet lower than the Maust elevator.

392 Q. Now isn't it a f-ct that the road bed, its main track is lower right opposite the plaintiff's elevator than it is the Maust elevator.

A. No it is not.

By Mr. Orr:

393 Q. Mr. Stump, who is the secretary treasurer testified there were seven bins besides the h*i*pper and cleaner and dump; how many bins did you calculate on?

A. Eleven.

394 Q. You were asked what this drive way would hold; describe to the court what that drive is, how it is built.

A. The drive way is clear through the main building and consists of just a roof and one side, both ends are open and one end side is open into the main building.

395 Q. Could that be used or is it ever used or is it intended to be used as a depository for grain?

A. The only way I can see it can be used is to board up the three sides.

396 Q. That would destroy it as a drive way wouldn't it?

A. It would.

397 Q. You gave the capacity of that elevator with eleven bins instead of seven, at 14800 bushels?

A. Yes sir.

398 Q. Isn't it true in ma-ing that computation; did you take into account the joists and studding?

75 A. The studding was not taken into account.

399 Q. Have you since computed the space in bushels occupied by the studding?

A. I have.

400 Q. What does that amount to?

A. 344 bushels.

401 Q. Then what would be the actual capacity of that elevator so far as holding grain was concerned?

A. It would be the difference between these, it would be 14456 bushels.

402 Q. You were asked about a room or hall or something, 8 x 8 x 24; tell the court what that room is, what it is used for?

A. That room is used for belting, and part of the stairway is in there; it is used more for belting.

403 Q. Is it designed for holding grain?

A. I don't see how it could.

404 Q. You say the belting runs through that space. Any cachinery in the-e besides the belting?

A. I think there is one grinder the-e, I ain't sure.

405 Q. That isn't a bin, it is to hold grain is it?

A. It is not.

406 Q. Calling witness'*es* attention to defendant's exhibit 1; that is intended to be a map of Richardson County; the part that is marked #1 is intended to represent the Missouri Pacific Railway; #2 is intended to represent Strausville and #3 is intended to represent the Burlington road; state whether that in a general way fairly represents the situation and direction of the tracks?

A. That represents the direction of the railroad and the direction of the county road.

407 Q. There is a lead pencil mark there intended to represent the county road that fairly represents that?

A. Yes sir.

76 Defendant offers in evidence exhibit 1. Plaintiff offers in evidence the memorandum of the engineer, Plaintiff's Exhibit 5.

By the COURT:

408 Q. How far is it from plaintiff's elevator to the public road which crosses the railroad west of it?

A. I would say 100 feet.

409 Q. How far is it from the points you designate as tangent on the siding to the point of the switch?

A. From a tangent on the siding to the point of the switch?

410 Q. Yes. Did you measure it?

A. No sir, I didn't.

411 Q. About how far is it?

A. It is about 100 feet, I would think, perhaps*e* a little less.

By Mr. ORR:

412 Q. You say it would take 960 feet to commence at a point where you could take the tangent, from one elevator to the other?

A. Yes sir.

413 Q. How far would it be necessary to build east or south east of the plaintiff's elevator to get connection again with the main track?

A. I would think 250 or 300 feet.

414 Q. So your calculation was based upon taki-g the switch that is now there and commencing at a point which would make a tangent from one elevator to the other and then go past the plaintiff's elevator to a connection south east of the elevator with the main line?

A. Yes sir.

415 Q. Take out the present connection with the main line?

A. Yes sir.

416 Q. Take up the track from that point to the main line
77 and extend it making a tangent of it going from one elevator to the other and then again to the main line.

A. Yes sir.

417 Q. So both elevators would be on one switch?

A. Yes sir.

By the COURT:

418 Q. Why would it be necessary to run 300 feet south east of the plaintiff's elevator?

A. We are supposed to allow for a straight track beyond the elevator at least two car lengths and that is about 125 or 150 feet and then we have to curve to get down to the main line which takes up the rest of that.

By Mr. JAMES:

419 Q. Is this switch which now connects the Maust elevator; is that as high as the main track?

A. It goes in on the same level; it is graded up a little bit.

420 Q. Is it as high as the main track, the switch that is there now.

A. It goes in on the same grade.

421 Q. Are the switch track and the main track the same elevation; opposite the elevator?

A. No. The spur track is lowest; less than a foot lower.

422 Q. It would not be necessary to build this sidetrack to plaintiff's elevator to make the grade as high as the main line would it?

A. Yes sir.

423 Q. Why?

A. We have to bring it in on the same grade as the main line at the switches and in crossing that road we could not cut up the road so as to have it a down grade there; we could not dig deep and if we didn't we would have three different tracks in the grade.

78 424 Q. There is a depot there now as it stands?

A. But if we continued the spur it would make a difference.

425 Q. How much lower is the switch at the Maust elevator than the main track?

A. Less than a foot.

426 Q. Then you say a while ago it was two feet lower at the plaintiff's elevator?

A. Yes sir.

427 Q. So a two foot grade there is all that would be necessary to make it level with the sidetrack there now?

A. A little over a foot.

By Mr. ORR:

428 Q. You would have to raise it in order to cross the public road on a level?

A. Yes sir.

Witness excused.

By Mr. GILLESPIE: We would like to withdraw our rest and introduce some further testimony.

By the COURT: You may recall Mr. Stump.

Mr. F. M. STUMP called by plaintiff.

Examined by Mr. GILLESPIE:

429 Q. In regard to the drive way and hall way I wish you would state to the court whethe- it has ever been used for storage and whether the grain was under shelter the time it was used?

A. We have store- grain in both places.

430 Q. State to the court in the hallway if it had a roof over it in good shape?

A. Yes sir.

431 Q. Now go on and tell about its construction.

A. The hallway, we have a bin under the hall wqy that
79 holds 50 or 75 bushels and we have a hole through the floor; w- can put grain in the hall way and run it into the bin and into the dump; that is the way we can use the hall way very convenient. It is fixed for that purpose. The drive way is like any other drive way in an elevator; you can fill the grain in there if you wish to.

432 Q. State whether you have ever had grain in the drive way?

A. Yes sir, we have had grain dumped in the drive way.

433 Q. How was it in reference to being under shelter?

A. It has a good roof.

434 Q. You stated to Mr. Bellman; what time did he get that elevator; what time did he begin to take in grain there?

A. Mr. Billman commenced there nearly two years ago now, sometime later than this in December or January, I don't remember the exact date.

435 Q. I will ask you to state to the court whether this was a public elevator, whether you have been ready to buy grain from everybody that came?

Defendant objects as leading, suggestive. Overruled. Exception.

A. Yes; buy grain from anybody that is disposed to sell to us.

436 Q. How much grain have you handled there in the last six months?

Defendant objects as immaterial. Overruled. Exception.

A. We have handled right in the neighborhood of 65 cars since the first of January, or about that time.

437 Q. I will ask you to state how much the elevator cost to build it and fix it in its present shape?

Defendant objects as immaterial, not within the issues. Overruled. Exception.

A. It cost right around $4000.

80 Cross-examination by Mr. ORR:

438 Q. If you stored grain in the drive way it would destroy it as a drive way?

A. We could not us- it after we had very much grain in it.

439 Q. How would you get your grain in the drive way?

A. Drive in and shovel it *it.*

440 Q. If you had it full of grain you could not drive in and shovel it in?

A. No sir.

441 Q. You would stand on the level of the ground and shovel from there.

A. We have a window at the side we can let down and shovel in there, but that is only in case of necessity.

442 Q. What was the necessity you used it for?

A. To dry some grain.

443 Q. You used it because y-u could not use the bins, is that the reason?

A. No sir.

444 Q. It was because the grain was not fit to go into the bins was that the reason?

A. No, not exactly.

445 Q. Why didn't you put it in the bin?

A. Because we didn't want to mix it; we had two bins of corn and didn't wish to mix it.

446 Q. Have you used it to dry it, it was because it was not fit to go in the bins?

A. Yes sir.

447 Q. It was not because of any lack of bin capacity?

A. Yes sir; when you get more kinds of grain than you can put in the bin and you don't want to mix it you use the hallway to store it.

448 Q. There was no lack of capacity; it was lack of number of bins; if you had wanted to you could have put all the stuff
81 in the bins you had?

A. We could possibly.

449 Q. And there was plenty of room to put it was not there?

A. No sir; there would have been, if it all had been dry.

450 Q. It was not a question of wet or dry; I say if you wanted to put that grain you say you spread out to dry in your drive way, into the bins you had capacity to do it, didn't you?

A. I suppose so.

451 Q. It was not because the bins were full you used the drive way was it?

A. It was because the bins were full I used the hall way.

452 Q. Answer my question?

A. No.

453 Q. You say it was because the bins were full you used the hall way?

A. Yes sir.

454 Q. When was that?

A. That was about last December sometime.

455 Q. You h-d about 13000 bushels in there, about 12000?
A. Somewhere in the neighborhood of that.
456 Q. This hall way would hold you say about 1000 bushels more?
A. Yes, but you understand I had some oats.
457 Q. You had about 400 bushels of oats didn't you?
A. 400 or 500 bushels.
458 Q. That would make 13400 bushels, you only had about 12000 bushels of corn?
A. Somewhere in the neighborhood of that.
459 Q. The hall way would hold another 1000 bushels?
A. Yes sir.
460 Q. You had used that hall way at that time because
82 your bins were full, is that right?
A. Because the main bins were full and I didn't want to fill up, so I could not handle the grain. You don't understand me quite.
461 Q. What does capacity mean?
A. It means what anything will hold.
462 Q. And do business?
A. Yes sir.
463 Q. This place you have described as a hall way, does that have any belts in it?
A. It has over head.
464 Q. How high above the floor is the lowest belt?
A. There is one belt runs probably four or five feet from the floor and we hardly ever use that.
465 Q. It is part of your machinery?
A. Yes sir.
466 Q. You don't consider that hall way part of your capacity?
A. In case of emergency we did.
467 Q. Only emergency?
A. Yes sir.
468 Q. The same as the drive way?
A. Yes sir.
469 Q. The same as the lot, is that right; if you had an extra amount of grain you would pile it out in the lot?
A. No sir we would make the farmers keep it until we got room to put it.
470 Q. If you were buying it and it was a low price and you wanted to get a lot of it you would store it outside?
A. No sir, we would make him hold it until we got room for it.
471 Q. Did you ever store any grain outside?
A. No sir.
472 Q. Never?
A. No sir.
83 473 Q. And this elevator company never did?
A. What do you mean by store?
474 Q. I think you know what store means?
A. We have a crib we used sometimes.

475 Q. Why didn't you measure the capacity of that crib and count in the elevator?
A. It was not necessary.
476 Q. You say there was 65 cars since the first of January this year; what is the average capacity of a car?
A. The average capacity is about 1150 bushels of corn.
477 Q. From the first of January up to the first of November did you calculate as having 65 cars?
A. Yes sir.
478 Q. That covers ten full months, is that right?
A. I suppose so.
479 Q. That would be about 6½ cars a month on an average, would it?
A. Possibly, I never figured it.
480 Q. That would be about 7475 bushels a month that would be about half your capacity on an average?
A. Yes sir.
481 Q. That is about the business of the concern isn't it?
A. Yes sir.
482 Q. This has been a pretty good season?
A. Yes it has been fair but we have had some hinderances.
483 Q. The crop was good?
A. Yes, the crop is all right.
484 Q. Did you handle any wheat?
A. Yes sir.
485 Q. The wheat crop was pretty good wasn't it?
A. Yes sir.
486 Q. The corn crop you have been handling?
A. Not this year's crop.
84 487 Q. Last year's you did?
A. Some, yes.
488 Q. So it has been about an average of 7500 bushels a month, about half your capacity?
A. Yes sir.
489 Q. Less than half your capacity?
A. That is just about half.

Witness excused.
By Mr. GILLESPIE: We would like to call Mr. Bair.
By the COURT: You may.

M. N. BAIR called by plaintiff, sworn by the deputy clerk.

Examined by Mr. GILLESPIE:

490 Q. You have been surveyor of this county have you not?
A. Yes sir.
491 Q. You go up to Strausville and make that paper you have?
A. I did.
492 Q. That is your blue print?
A. Yes sir, Plaintiff's Exhibit 6.
493 Q. I wish you would state to the court how long you have

been in the surveying business, when you first commenced, how long you have engaged in that business?

A. About twenty two years.

494 Q. I wish you would describe to the court the location and situation of the elevator in controversy, in reference to the railroad track and the distance as you got them down?

A. From the center of the highway run-ing north and south, to the switch is 67 feet; from the center of the highway to the tangent in the switch is 350 feet. From the center of the highway to the Maust Elevator is 850 feet. At the time this was made the
85 elevator was not built.

495 Q. Do you know anything about the locality of the elevator in reference to the plat you have there?

A. I placed some marks here but whether the elevator was built at that point I don't know.

496 Q. Have you been there since you drew that map?

A. Only to pass there.

497 Q. Assuming the place *y*you have marked there; what is the distance from the point you marked for the elevator to the main track at the nearest point?

A. Probably 50 feet.

498 Q. What is the distance from that main track at the nearest point to the Maust elevator?

A. I presume it is about the same.

499 Q. What is the distance from the elevator that you marked to what you call the tangent of that switch?

A. It must be right close to 700 feet.

500 Q. *Whis* elevator is that?

A. From the farmers' elevator to the tangent west of the road on the sidetrack.

501 Q. State to the court are you acquainted with civil engineering.

A. I have heard of it.

502 Q. Have you studied it?

A. I have studied it.

503 Q. Do you know what difficulties the railroad would have to contend with in building a switch from the nearest point possible to the elevator where you made the marks you speak of, as the place to build it?

A. It is always advisable not to tap the main line oftener than you have to and the only place it could be tapped, according to the rules laid down would be to tap the other switch.

86 504 Q. State the nearest point at which the railroad could properly tap the other switch?

A. About 700 feet.

505 Q. How far east before they would get the main line again?

A. It would require about 125 feet to get in; there ought to be some car room.

506 Q. Give us the whole distance?

A. About 250 feet.

507 Q. Added to 700?

A. Yes sir.

508 Q. So it would make about 1000 feet?

A. No answer.

509 Q. You are familiar with the locality there; what would prevent the railroad company from allowing the elevator to be built alon- that same track that this Maust elevator is on?

Defendant objects as calling for the opinion of the witness not a proper subject of inquiry for an expert, not within the issues, Sustained.

Plaintiff offers to prove by this witness that if the railroad company desired to do so they could without any injury to itself and without any inconvenience designate the place along the present track or switch for the Maust elevator, along side of which this elevator could be moved to and would be moved by plaintiff without any expense to the railroad and this application has been made to them in writing as stated in the amended application for a mandamus and the railroad company has refused to designate any place or permit the plaintiff to erect on their right of way any elevator.

87 Defendant agrees that they may show by this witness if they can that they have served a written notice on the defendant company to construct an elevator and that the company has absolutely refused to permit them to do so, and objects to the balance of the offer as not within the issues of the case. Sustained. Exception.

510 Q. I wish you would state about the grade there from the Maust elevator to the main line and along the line y-u have been speaking of, how much would the grade be?

A. I think it is a hill; there is quite a raise there in the track.

511 Q. Where?

A. The switch and main line.

512 Q. How much lo-er is the switch at the Maust elevator than the main line?

A. It may be a foot or a foot and a half.

513 Q. How much lower is the plaintiff's elevator than the main line?

A. I don't know; this was not built when I was there.

514 Q. You are familiar with the ground there?

A. The ground there is quite a little raise or sort of cut in there.

515 Q. You don't know exactly?

A. No, because I have not been there -ince the building was put up, but the ground is naturally higher at that point.

By Mr. ORR:

516 Q. From the railroad main track north along that wagon road, the ground rather ascends, goes up a sort of hill; is there a creek and iron bridge there?

A. Yes on the north side of the track.

517 Q. Going from the railroad to the bridge on the wagon road which way does the ground go, up or down?

A. About level across there.

518 Q. After you get beyond the right of way north, it is going up or down?

A. I guess it must be a mile and a quarter before there is
88 any raise.

519 Q. How is it south of the main line?

A. It goes up.

Plaintiff offers in evidence map, exhibit 5.

Witness excused.

Mr. F. M. STUMP recalled by plaintiff.

Examined by Mr. GILLESPIE:

520 Q. Do you k-ow where the points Mr. Bair designated as the place for the elevator are?

A. I don't know wh-ther I do or not but we got him out there to survey along there and we put it at the place.

521 Q. Where he designated?

A. Yes sir.

522 Q. Do you know what marks he left so you would be certain to get it at the same place he designated?

A. I don't know that I do.

By Mr. ORR:

523 Q. As a matter of fact how far is your elevator east of the east line of the wagon road?

A. It must be in the neighborhood of 100 feet.

524 Q. Do you k-ow anything about it, or are you guessing at it?

A. I don't know accurate, but we got him there to survey to see how many feet we would be from the switch and tangent and he has marked there and we put the elevator where he made his marks.

525 Q. Do you know what the scale of that map is?

A. It says some place on the map.

526 Q. What does it say?

A. It is, I suppose one sixtieth of an inch to a foot: I don't know, Mr. Bair's marks, I am just guessing at that.

Witness excused.

Case closed.

89 PLAINTIFF'S EXHIBIT 2.

To the Missouri Pacific Railway Company:

The Farmers' Elevator Company of Strausville Nebraska, which has succeeded to all the rights and properties of the National Farmers' Exchange at said place, do hereby make this written application to you and do ask you for a site on the right of way of the Missouri Pacific Railway at the said station of Strausville Nebraska for the

purpose of constructing an elevator on the said right of way at the said station of Strausville Nebraska by the said Farmers' Elevator Company.

THE FARMERS' ELEVATOR COMPANY,
By H. J. PRICHARD, *President.*

Received this written application on the 31st day of May, 1906, and served the same upon the within named Missouri Pacific Railway by delivering a true and certified copy of the within application to J. B. Vaner Station Agent of the Missouri Pacific Railway Company, in Falls City Nebraska on the 31st day of May, 1906. All done in Richardson County Nebraska, and in the City of Falls City.

W. T. FENTON, *Sheriff.*

Sheriff Costs for Service on R. R. Co. 95 cts.

90 PLAINTIFF'S EXHIBIT 3.

To the Missouri Pacific Railway Company:

On the 31st day of May, 1906, The Farmers' Elevator Company of Strausville, Nebraska, through its president, H. J. Prichard, served upon you a written application, asking you for a site on the right of way of your road at the station of Strausville Nebraska for the purpose of constructing thereon an elevator.

It has now been more than 60 days since the service of this application and you have neglected and refused to grant the request of the said elevator company. The Farmers' Elevator Company which succeeded to all the rights and properties of the National Farmers' Exchange at the said station of Strausville, now has, as you know, an elevator constructed adjoining the right of way of your road at the said station of Strausville Nebraska. You have steadily refused since the construction of this elevator to give it a side track or to accord it the same privelages that you have to a rival elevator at the same station.

Being unable to procure from you a side track, the Farmers' Elevator Company asked you for the privelage of constructing this elevator on your right of way. You have neglected and refused this request also. The Farmers' Elevator Company of Strausville Nebraska now makes a final written request of you for a side track connecting their elevator at Strausville Nebraska with your road in order that cars may be loaded from this elevator the same as is done at the other elevator at this same station.

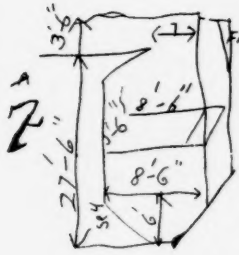
Unless this request for a side track is granted within a reasonable time, The Farmers' Elevator Company of Strausville Nebraska proposes to take whatever steps that are necessary at law to obtain the side track that is now requested from you, and to prevent further unjust and unlawful discrimination against it.

THE FARMERS' ELEVATOR COMPANY
OF STRAUSVILLE, NEBRASKA,
By H. J. PRICHARD, *President.*

(Ex. 3.)

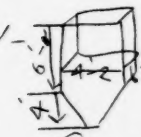
No. 946 M.P. Ry. ed. p. 92
Neb. & W. R.R.

FALLS CITY, NEBRASKA..... 190..



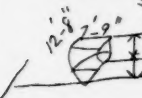
A = 42 = A = 1633.10
42" = C = 1633.10

9 = B = 313.62"

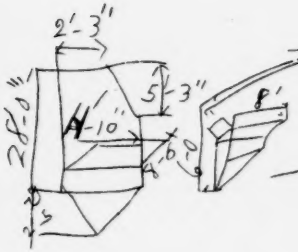


8 E 193.60

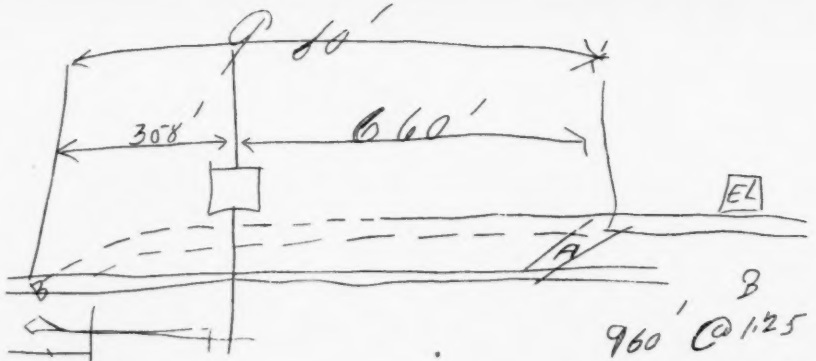
D 72.00
~~Connecting Chutes~~ a ~~72.00~~



59 cyl. "B" = 2375.90



6 4 65 = 2827.40
" — 2827.40
" — 2827.40
" — 2827.40
4 — 264.00
4 2 226.50
(over) 17943.42



960' @ 1.25 = 1200.00

Mowing connec + (A & B) = 50.00

420 of 3' fill = 1512 } 2808 @ .40 per yd
540 of 2' " = 1296 }

1040 yds @ .40 = $416.00

Regrading road 50 x 36 x 3 = 167 " .40 = 66.80

$1732.80

1480.00
347
1456

91 Received this written application on the 2nd day of August, A. D. 1906, and served the same upon the within named Missouri Pacific Railway Company by delivering a true and certified copy of the within application to Jas. B. Varner Station Agent of the Missouri Pacific Railway Company in Falls City Nebraska. All done in Falls City, Richardson County Nebraska on the 2nd day of August, 1906.

J. E. McFARLAND, *Constable.*

92 PLAINTIFF'S EXHIBIT 5.

(Here follow diagrams & memoranda marked p. 92.)

93 PLAINTIFF'S EXHIBIT 6.

94 DEFENDANT'S EXHIBIT 1.

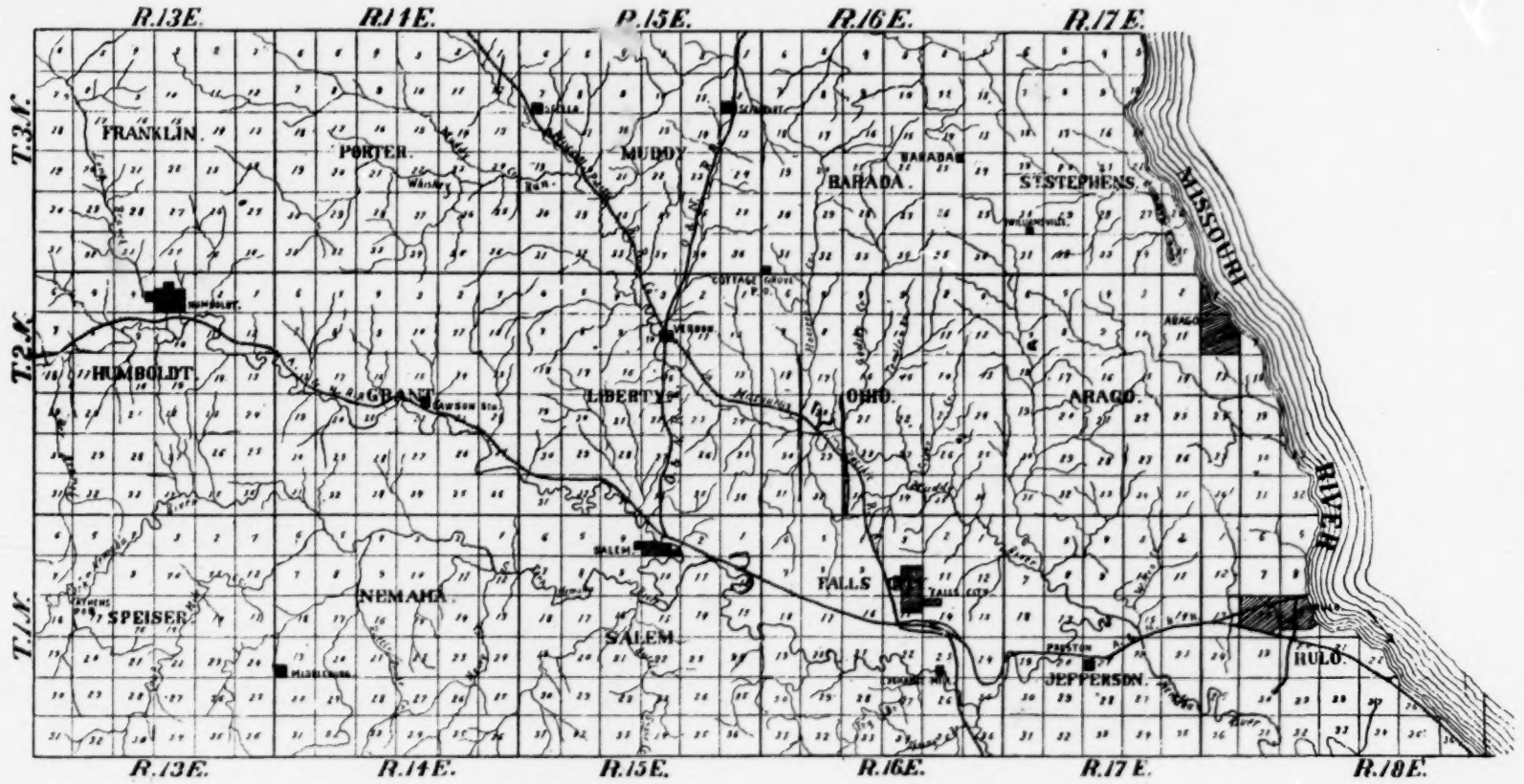
(Here follows map marked p. 94.)

No 346
M. P. Rly Co. } p. 94
v.
Nebraska &c.

Map of Richardson County, Nebraska

NEMAHA COUNTY, NEB.

HENRY C. SMITH
Financial Correspondent
Negotiator of Bonds and Farm Mortgage Loans
FALLS CITY :-: NEB.



95 And be it further remembered, That the said defendant having within the time heretofore allowed for that purpose by the court, reduced to writing in this its proposed bill of exceptions, all of the evidence offered on the trial of the above entitled cause, together with the objections thereto, the ruling of the court on such objections, and the exceptions of the plaintiff and defendant to said rulings made and taken at the time, and having served the same upon the attorney for the above named plaintiff, according to law for examination and amendment, and the same being now before me, the undersigned judge, before whom said cause was heard, on the motion of the -ttorney for the defendant that the same be signed, settled, allowed and made a part of the record in said cause in said court; now therefore, I the said judge, do hereby certify that this, the defendant's bill of exceptions, contains all of the evidence as offered in the above cause, all of the objections thereto, the rulings of the court thereon, and the exceptions of the plaintiff and defendant respectively, to said rulings made and taken at the time.

Wherefore, I, the said judge, do hereby settle, allow and sign this, the defendant's bill of exceptions and do hereby -rder that it be made a part of the record in said cause in said court.

JOHN B. RAPER,
District Judge.

96 I, J. C. Martin, do certify that I am one of the official reporters of the First District of Nebraska; that I reported the foregoing case and that this is a true, full, and complete copy of all the testimony offered, oral and documentary, as shown by my shorthand notes.

J. C. MARTIN, *Reporter.*

Fees Paid by Defendant.

I, Chas. Loree, do certify that I am the clerk of the district court in and for Richardson County, Nebraska; that this is the original bill of exceptions in this case filed in my office.

Witness my hand and official seal this 22nd day of March, 1907.

CHAS. LOREE,
[SEAL.] *Clerk of District Court.*

Endorsed: 15128—State *ex rel.* Farmers' Elevator Company *v.* Mo. Pac. Ry. Co.—Bill of Exceptions—Supreme Court of Nebraska—Filed Mar. 26, 1907.—H. C. Lindsay, Clerk.

97 And afterwards on the day *day* there was filed in the office of the Clerk of said Supreme Court a certain Præcipe, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

THE STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA, Appellee,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Præcipe.

To the Clerk of the Supreme Court of the State of Nebraska:

Kindly issue Notice of Appeal in the above cause, directed to the sheriff of Richardson County, Nebraska, to be served upon the above named appellee or its attorneys of record, R. C. James and C. Gillispie, to be returnable according to law, notifying said appellee and its attorneys of record, and each of them, of this appeal from a judgment rendered by the District Court of Richardson County, Nebraska, on the 1st day of February, A. D., 1907, in an action therein pending wherein the State of Nebraska *ex rel.* The Farmers' Elevator Company of Strausville, Nebraska, was plaintiff, and The Missouri Pacific Railway Company was defendant, granting a peremptory writ of mandamus against The Missouri Pacific Railway Company, commanding it to forthwith erect, equip and maintain a proper switch or side track, leading from said Company's main line of railway to the elevator of The Farmers' Elevator Company of
98 Strausville at the station of Strausville in Richardson County, Nebraska. The attorneys of record of said appellee in said District Court in said cause were R. C. James and C. Gillispie, each of Falls City, Nebraska.

THE MISSOURI PACIFIC RAILWAY COMPANY,
By JAMES W. ORR,
B. P. WAGGENER,
REAVIS & REAVIS,
Attorneys for Appellant.

Endorsed: 15128—State *ex rel.* Farmers' Elevator Co. *v.* Mo. Pac. Ry. Co.—Præcipe—Supreme Court of Nebraska—Filed Mar. 26, 1907—H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Assignment of Errors, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

THE STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA, Appellee,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Brief and Assignment of Errors Complained of.

Now comes the appellant and alleges and complains that heretofore, and on to-wit: the 1st day of February, 1907, being one of the regular days of the February, 1907, term of the District Court
99 of Richardson County, Nebraska, a judgment was rendered against this appellant by the consideration of the said District Court, granting a peremptory writ of mandamus against this appellant in said cause, commanding it to forthwith erect, equip and maintain a proper switch or side track leading from this appellant's main line of railroad to a certain elevator situated adjacent to the right of way of appellant's railroad at the station of Strausville in Richardson County, Nebraska, which switch or side track should be of suitable length to approach as near as necessary to approach the elevator thereon erected by the Farmers' Elevator Company of Strausville, to enable said Elevator Company to load cars directly from said elevator to appellant's cars on said switch or side track, together with the costs of suit, and this appellant alleges and complains that the rendition of said judgment and the proceedings relating thereto are erroneous and prejudicial to the substantial rights of this appellant, a true, correct and complete transcript of the record and bill of exceptions containing the errors complained of are hereto attached, marked "Exhibit A" and made a part hereof. That said judgment is erroneous and the errors relating thereto are briefed and assigned as follows, viz:

First.

Because the court below erred in overruling respondent's plea in abatement to the jurisdiction of said court (transcript 10-11-12-13 and 14), to which the defendant below, at the time, duly excepted.

Second.

Because the court below erred in overruling the objection of defendant below to the introduction of any evidence (record pp. 5) to which the defendant below duly excepted.

100 Third.

Because the said District Court of Richardson County, Nebraska, had no jurisdiction of the subject matter of said action, nor authority of law to hear, try or determine the issues thereof, such authority being vested in the Interstate Commerce Commission and in the United States courts, exclusively.

Fourth.

Because article 5 of chapter 73 of the Compiled Statutes of Nebraska, under which said action was brought in the District Court of Richardson County, Nebraska, is in contravention of and repugnant to section 15 of article 3 of the Constitution of the State of Nebraska, which provides:

"The legislature shall not pass local or special laws in any of the following cases: * * * to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever."

Also:

"In all other cases where a general law can be made applicable no special law shall be enacted."

Fifth.

Because section 1 of article 5 of chapter 72 of the Compiled Statutes of Nebraska, 1905, is violative and in contravention of article 1 of the Constitution of the State of Nebraska, which provides:

"The property of no person shall be taken or damaged for public use without just compensation therefor."

Sixth.

Because article 5 of chapter 72 of the Compiled Statutes of Nebraska, 1905, is repugnant to and in contravention of section 3 of article 1, known as the "Bill of Rights" of the Constitution of the State of Nebraska, which provides:

"No person shall be deprived of life, liberty or property
101 without due process of law."

Seventh.

Because article 5 of chapter 72 of the Compiled Statutes of Nebraska, 1905, is violative or and repugnant to section 21 of article 1 of the Constitution of the State of Nebraska, which provides:

"The property of no person shall be taken or damaged for public use without just compensation therefor."

Eighth.

Because said article 5 of chapter 72 of the Compiled Statutes of Nebraska, 1905, is violative and in contravention of and repugnant to article 14 of the Amendments to the Constitution of the United States of America, which provides:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ninth.

Because the Farmers' Elevator Company of Strausville, Nebraska, the relator, is a corporation of Nebraska, engaged in interstate com-

merce, and the respondent, The Missouri Pacific Railway Company, is a corporation organized under the laws of the State of Missouri, operating a railroad into and through several states, including the state of Nebraska, and is engaged in interstate traffic and commerce, or commerce between the states, and that the shipments proposed to be made by the relator over respondent's railroad are shaip-
102 ments originating in the State of Nebraska, and terminating in some other state or territory of the United States, and that such shipments and everything in connection therewith are regulated by the Act of Congress entitled "An Act to regulate commerce as amended, and acts supplementary thereto," adopted by the Congress of the United States and approved June 29th, 1906, putting into effect that part of section 10 of article 1 of the Constitution of the United States of America, which provides:

"The congress shall have power * * * to regulate commerce with foreign nation-, among the several states and with the Indian tribes."

And the congress having legislated upon the precise question involved in article 5 of chapter 72 of the Compiled *States* of Nebraska, 1905, *is* has exclusive jurisdiction thereof, and the act of the legislature of Nebraska, above mentioned, and any enforcement thereof, is in violation of and repugnant to said provisions of the Constitution of the United States and the laws of Congress passed in relation thereto.

Tenth.

Because the court below erred in overruling and denying the appellant's motion for new trial.

Eleventh.

Because the state of Nebraska is not the real party in interest in said proceeding, nor has the said state of Nebraska any beneficial interest in the result thereof, nor has it the legal capacity to sue or maintain said action.

Therefore this appellant prays that said judgment so heretofore rendered may be set aside and held for nought and that said act of the legislature, being section 1 of article 5 of chapter 72 of the Compiled Statutes of Nebraska, 1905, be declared unconstitutional and void and that this appellant be granted a new trial and re-
103 stored to all things lost by reason of said judgment.

REAVIS & REAVIS,
JAMES W. ORR, &
B. P. WAGGENER,
Attorneys for Appellant.

Endorsed: 15128—State *ex rel.* Farmers' Elevator Co. *v.* Mo. Pac. Ry. Co.—Assignment of Errors.—Supreme Court of Nebraska—Mar. 26, 1907—H. C. Lindsay, Clerk.

And on the same day there was issued out of the office of the Clerk of said Supreme Court a certain Notice of Appeal in words and figures following, to-wit:

Notice of Appeal.

THE STATE OF NEBRASKA, *ss:*

To the Sheriff of the County of Richardson:

You are hereby commanded to notify The State of Nebraska, *ex rel.* The Farmers' Elevator Company of Strausville, Nebraska That an appeal has been taken to the Supreme Court of the State of Nebraska by The Missouri Pacific Railway Company asking the reversal of a judgment against it rendered on the 1st day of February A. D. 1907, in a certain cause in the District Court of Richardson County, wherein The State of Nebraska *ex rel.* The Farmers' Elevator Company, was plaintiff, and The Missouri Pacific Railway Company was Defendant.

You will make due return of this notice, on or before thirty days after the date hereof.

Witness my hand and the Seal of said Court, at the City of Lincoln, this 26th day of March, 1907.

[SEAL.] H. C. LINDSAY, *Clerk,*
By VICTOR SEYMOUR, *Deputy.*

104 And afterwards, to-wit: on the 28th day of March, 1907, there was filed in the office of the Clerk of said Supreme Court a certain waiver of Issuance and service of Notice of Appeal, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

THE STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Waiver of Issuance and Service of Notice of Appeal.

Now comes the appellee, by R. C. James and C. Gillispie, its attorneys of record, and hereby waives the issuance and service of notice of appeal in the above entitled cause, and hereby enters the appearance of said appellee in the Supreme Court of the State of nebraska in said cause.

FARMERS ELEVATOR CO.,
By R. C. JAMES &
C. GILLISPIE, *Its Attorneys.*

Dated at Falls City, Nebraska, March 25th, 1907.

Endorsed: 15128—State *ex rel.* Farmers' Elevator Co. *v.* Mo. Pac. Ry. Co.—Waiver of Notice—Supreme Court of Nebraska Filed Mar. 28, 1907—H. C. Lindsay, Clerk.

105 And afterwards on April 1, 1907, the Notice of Appeal was returned with service acknowledged, and said service was filed in the office of the Clerk of said Supreme Court, being in the words and figures following, to-wit:

Service of the within Notice of Appeal acknowledged this 30 day of March, 1907.

STATE *EX REL.* FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA, *Appellees,*
By R. C. JAMES, *Attorney.*

Endorsed: Supreme Court of Nebraska—Filed Apr. 1, 1907—H. C. Lindsay, Clerk.

And afterwards on the 13th day of September, 1907, there was filed in the office of the Clerk of said Supreme Court a certain Motion of Appellees to Dismiss, and Notice and Proof of Service of said Motion, in the words and figures following, to-wit:

In the Supreme Court of Nebraska.

No. 15128.

STATE *ex Rel.* FARMERS' ELEVATOR COMPANY, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Appeal from Richardson County District Court.

Motion to Dismiss.

Appellee moves the Court to dismiss the appeal in the above entitled cause for the failure of appellant to seasonably serve his brief, and for cause shows that

The record was filed and the said appeal duly docketed in this court on the 26th day of March, 1907, but a brief therein has not
106 been served by the appellant.

R. C. JAMES &
C. GILLISPIE,
Attorneys for Appellee.

J. C. ORR &
REAVIS & REAVIS,
Att'ys for —— ——.

In the Supreme Court of Nebraska.

STATE *ex Rel.* FARMERS' ELEVATOR COMPANY, Appellee,
vs.
MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Notice of Motion.

To the Missouri Pacific Railway Company, Corporation:

On Tuesday, September 17th, 1907, this appellee will submit to said Supreme Court his motion in the above entitled cause, a copy of which said motion is hereto attached.

R. C. JAMES &
C. GILLISPIE,
Attorneys for Appellee.

Service of the within notice and copy of the motion therein refer-ed to accepted this 12 day of September, 1907.

J. C. ORR &
REAVIS & REAVIS,
Attorney- for Appellant.

Endorsed: 15128—In the Supreme Court of Nebraska—State *Ex Rel.* Farmers' Elevator Company, Appellee *vs.* Missouri Pacific Railway Company, Appellant—Motion to Dismiss Filed.—Supreme Court of Nebraska—Filed Sep. 13, 1907—H. C. Lindsay, Clerk.

107 And afterwards on the 16th day of September, 1907, there was filed in the office of the Clerk of the said Supreme Court, a Stipulation in the words and figures following, to-wit:

THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA,
Pl'ff,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Respondent, Defendant.

Stipulations.

It is hereby stippulated and agreed by parties hereto, that this court above shall over-rule said Motion to Dismiss filed a few days ago, and make an order that respondent shall serve and file briefs in said cause on or before sixty days from this date, and Appellee answer briefs to be served and filed on or before sixty days after said service in said cause as above.

This dated September 14th A. D. 1907.

C. GILLISPIE,
R. C. JAMES,
Att'ys for Said Appellee Elevator Company.
JAS. W. ORR &
REAVIS & REAVIS,
Att'ys for Appellants.

Endorsed: 15128—State of Nebraska *ex rel.* Farmers' Elevator Co. of Strausville, *vs.* The Missouri Pacific Ry. Co.—Stipulation *in re* Briefs—Supreme Court of Nebraska—Filed Sep. 16, 1907—H. C. Lindsay Clerk.

108 And afterwards, to-wit, on the 17th day of September, 1907, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Order in the words and figures following, to-wit: '.

Supreme Court of Nebraska, September Term, A. D. 1907

Sept. 17.

No. 15128.

STATE OF NEBRASKA *ex Rel.* FARMERS' ELEVATOR COMPANY, Appellee,
v.
MISSOURI PACIFIC RY. CO., Appellant.

Appeal from the District Court of Richardson County.

Upon stipulation of parties, it is by the court ordered that appellant be, and hereby is, allowed until November 14, 1907, to serve and file briefs; appellee allowed until January 14, 1908, to serve and file briefs.

And afterwards, to-wit: on the 9th day of November, 1907, there was filed in the office of the Clerk of said Supreme Court a certain Stipulation in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

No. 15128.

THE STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Stipulation.

It is hereby stipulated and agreed by the parties hereto that the time within which the appellant may prepare and serve its brief be extended to December 1, 1907, and that the appellee shall
109 have 40 days thereafter in which to file and serve its reply brief thereon.

R. C. JAMES AND
C. GILLESPIE,
Attorneys for Appellee.
REAVIS AND REAVIS,
JAMES W. ORR &
B. P. WAGGENER,
Attorneys for Appellant.

Endorsed: 15128—State *ex rel.* Farmers' Elevator Co. *v.* Mo. Pac. Ry. Co.—Stipulation *in re* briefs.—Supreme Court of Nebraska—Filed Nov. 9, 1907,—H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 19th day of November, 1907, there was render- by said Supreme Court and entered of record upon the Journal thereof a certain Order in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1907.

No. 15128.

STATE OF NEBRASKA *ex Rel.* FARMERS' ELEVATOR COMPANY, Appellee,
v.
MISSOURI PACIFIC RAILWAY CO., Appellant.

Appeal from the District Court of Richardson County.

This cause coming on to be heard upon stipulation of parties hereto for an extension of time within which to file briefs, was submitted to the court; upon due consideration whereof, it is by the court ordered that said stipulation be, and the same hereby is, allowed; that appellant be, and hereby is, allowed until December 1, 1907, to serve and file briefs; that appellee be, and hereby is, allowed until January 7, 1908 to serve and file answer briefs.

110 And afterwards, to-wit: on the 31st day of January, 1908, there was filed in the office of the Clerk of said Supreme Court a certain Motion to Consolidate, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

No. 15128.

THE STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEB., Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

No. 15122.

THE STATE OF NEBRASKA, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Motion.

Now comes the appellant, The Missouri Pacific Railway Company, and represents to the court that the above causes present the same

questions and should be argued, considered and decided together and therefore

Moves the court that when said causes are reached for argument at the session of this court, commencing Tuesday, February 18, 1908, that the same be ordered presented together, and that each and both of said causes be presented to the court itself, as the questions involved relate to the construction of the constitution of the state of Nebraska and the constitution and laws of the United States.

B. P. WAGGENER,
JAMES W. ORR,
Attorneys for Appellant.

111 Endorsed: 15122 & 15128—State *v.* Missouri Pacific Ry. Co.—Motion to Consolidate—Supreme Court of Nebraska—Filed Jan. 31, 1908—H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 4th day of February, 1908, there was filed in the office of the Clerk of said Supreme Court a certain Proof of service of Motion to Consolidate, in the words and figures following, to-wit:

FALLS CITY, NEBR., *Jan.* 31, 1908.

B. P. Waggener, General Attorney, M. P. Ry. Co., Atchison, K's.

The Mo. Pac. Ry. Co.
Received Feb. 1, 1908.
General Attorney's Office,
Atchison, Kansas.

DEAR SIR: I hereby acknowledge the receipt of your favor of the 30th inst. together with Notice of Motion which you desire Mr. Gillispie and myself to sign. Would say in reply thereto that Mr. Gillispie and I have concluded not to sign the motion for the reason that we know nothing of the merits of the other case, No. 15,122, with which you wish to join, us, nor the attitu-e that counsel for said case No. 15122 might assume in its presentation to the court. Our duty to our clients, it seems to us, demands that we exert all our energies in their behalf and the fact that the peculiar history of the other case might in some way affect the decision rendered, causes us to hesitate in taking any step that might, in the end, affect our case.

Admitting that the questions presented to the court are principally questions of law, the fact remains, it seems to us, that the facts must necessarily enter largely into the final determination thereof. We are familiar with the facts in our case. We know nothing of the
112 facts in the other case. Would say further that we are anxious that this question be determined at the earliest possible date by the Court, and therefore we are willing to accept service of Notice of Motion as of the 30th inst., but are unwilling to agree to joinder of causes. Serve notice before Monday noon, Feb. 3rd, as Mr. Gillespie desires to go to Lincoln Monday afternoon to resist motion.

Very respectfully, R. C. JAMES.

Endorsed: 15128—State *v.* Missouri Pacific Ry. Co.—Proof of Service of Motion to consolidate—Supreme Court of Nebraska—Filed Feb. 4, 1908—H. C. Lindsay, Clerk.

113 And afterwards, to-wit: on the 18th day of February, 1908, the following among other proceedings were had and done in said Supreme Court, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1908.

Feb. 18.

The following causes were argued and submitted to the Court and Department No. 1.

* * * * * * *

No. 15128.

STATE *ex Rel.* FARMERS' ELEVATOR COMPANY
v.
MISSOURI P. RY. CO.

Appeal from Richardson County.

And afterwards, to-wit, on the 19th day of March, 1908, there was rendered by said Court and entered of record upon the Journal thereof a certain judgment in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1908.

Mar. 19.

No. 15128.

STATE OF NEBRASKA *ex Rel.* FARMERS' ELEVATOR COMPANY,
Appellee,
v.
MISSOURI P. RY. CO., Appellant.

Appeal from the District Court of Richardson County.

This cause coming on to be heard upon appeal from the district court of Richardson County, was argued by counsel and submitted to the Court; upon due consideration whereof, the Court doth find no error apparent in the record of the proceedings and judgment of the said district court, it is therefore considered, ordered and adjudged that the said judgment of the district court be, and the same hereby is affirmed; that appellee pay all costs incurred herein by it, taxed at $——, and have and recover of and from the ap-

pellant all its costs so expended herein; that appellant pay all
114 costs incurred herein by it, taxed at $——, for all of which execution is hereby awarded, and that a mandate issue accordingly.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Opinion by said Court, pursuant to which the preceding judgment was entered, which Opinion is in the words and figures following, to-wit:

115 *Commissioner's Opinion.*

No. 15128.

STATE *ex Rel.* FARMERS' ELEVATOR CO.
v.
MISSOURI PACIFIC RY. CO.

Opinion filed March 19, 1908.

Department No. 1.

Section 11 of Chapter 105, Laws of 1905, is not subject to the objection of being special legislation, or of allowing the taking of private property without just compensation, or of depriving the citizen of his property without due process of law. State *v.* M. P. Ry. Co., No. 15122.

2. In consideration of the franchises that they receive from the state, railroad companies agree to perform certain duties toward the public, and the power of determining those duties and enforcing their performance is vested in the Courts of the State.

3. To deny to the state the power to require the erection of depots, the construction of sidetracks, and such other facilities as the public necessities require, would enable railway companies to create a monopoly in the handling the products of the country adjacent to their lines, and to turn it over to whomever they chose.

116 DUFFIE, *C.:*

The petition in this case recites that the relator, The Farmers' Elevator Company, of Strausville, Nebraska, is a corporation organized under the laws of this state, and engaged in operating a grain elevator on land adjacent to defendant's right of way at the station of Strausville, Richardson County; that the elevator has a capacity of 15000 bushels, and was completed prior to April 1, 1905.

It is further alleged that the defendant company has refused to construct a sidetrack to said elevator, by reason of which the plaintiff has been unable to load grain directly from its elevator into the cars of the defendant to its great damage; that application had been made for a site for the elevator on the defendant's right of way at Strausville and the application refused, and that thereafter a written

request was made on the defendant company to extend its sidetrack to the elevator which was also refused, that defendant had for a time prior to April 1, 1905, maintained a side track to another elevator at Strausville, and that plaintiff is not afforded equal facilities with other patrons of the road.

A writ of mandamus was asked requiring the defendant to construct a sidetrack to the plaintiff's elevator and to equip[t] and maintain the same.

The answer of the defendant was substantially the same as the answer filed in State *v.* M. P. Ry. Co., No. 15122, in which case an opinion has been filed.

117 The district court ordered a mandamus to issue as prayed in the petition, and defendant has appealed.

In State *v.* Missouri P. R. Co., No. 15122, we have considered and passed on most of the questions presented by the record in this case. In No. 15122, the state recovered the penalty prescribed in ch. 105, Laws of 1905, for failure of the railroad company to construct a sidetrack to an elevator erected by the Manley Co-operative Grain Association on land adjacent to the right of way of the railroad company.

In our former opinion, we did not discuss at length the claim made by the defendant that the requirement of the statute that a site should be furnished by the railroad company on its right of way for the building of an elevator of the prescribed capacity, or a sidetrack extended to the location of an elevator built adjacent to the right of way of the railroad company in case it refused to furnish a site on its right of way where sidetrack facilities existed, was a taking of the property of the company without due process of law in violation of the Federal Constitution and the Constitution of this State. Since the opinion in No. 15122 was filed, we have had time to further consider the question made by this objection, and further reflection has served to confirm us in the opinion that the statute is not open to the objection urged by the defendant. It is not contended that a railroad company is not obliged to furnish facilities for the receipt and delivery of passengers and freight offered for carriage. In State *v.* Republican Valley R. R. Co., 17 Neb. 647, we held

118 that it was a duty imposed on the railroad company by the common law to maintain depots and warehouses for the receipt and delivery of passengers and freight, and on a rehearing of the same case, we held that the Constitution and statutes of this state imposed on railroad companies that duty which might be enforced by the court, in case of neglect of the company to furnish the public with adequate facilities. See 18 Neb. 512.

In this view of the law, and the duty of the railroad company to furnish facilities to shippers over its line, there can be no doubt that it would, in the absence of any provision made for receiving grain intended for shipment, be compelled to erect and maintain suitable and adequate facilities for that purpose.

While not speaking directly to the point, the Supreme Court of the United States, in Missouri P. R. Co. *v.* Nebraska, 164 U. S. 403 strongly intimates that a railroad company may be compelled to maintain elevators or warehouses for the receipt of grain offered by

patrons of the road, and equal facilities to all persons of access from their own lands to its tracks, and the use of the tracks for the purpose of shipping or receiving grain or other freight.

It cannot be denied that the state may require a railroad company to renew its ties and tracks when the safety of the public demands it. It may also require the company to construct expensive viaducts and keep them in repair. Chicago B. & Q. R. Co., *v.* State, 47 Neb. 549. Affirmed by the Supreme Court of the United States. 170
119 U. S. 57. Our general railroad law provides, "Such corporations shall be authorized and empowered to lay out, locate, construct, furnish, maintain, operate and enjoy a railroad with single or double tracks, with such sidetracks, turnouts, offices and depots 'as shall be necessary' between the places of the termini of said road." In State *v.* Republican R. R. Co., 18 Neb. 512, *supra*, we held that this provision of the statute required the railroad company to furnish all necessary depots, and this holding must on principle extend to necessary sidetracks demanded for public use. Even in the absence of this statute, under which the defendant constructed and is operating its road, it would seem that the state has power to order such sidetracks as the convenience and necessity of its citizens demand.

It is true that there are one or more elevators at the station of Strausville, but the farmers in that vicinity do not seem willing to deal with the parties operating them, and have invested their money in the erection of another one of the requisite capacity, and this expenditure is evidence of a satisfactory character of some reason existing for another elevator at that place.

What would be the result of a denial of the power of the state to require the construction of sidetracks under the circumstances of this case. It would require the farmers to deal with the elevators doing business prior to the building of the one for which the sidetrack is demanded. In other words, the railroad company could create a monopoly of the grain business and turn it over to whoever
120 it saw fit; it could compel the producers adjacent to every station on its line to deal with the parties having elevator and sidetrack facilities for handling their produce.

To make the railroad company the sole and ultimate judge of the place or building from which it will receive its freight or to dictate to the public, the party to whom the produce of the country shall be delivered or sold, would give such corporations power to control the market of the country and to grant a monopoly in favor of any party whom it might choose, and to promote or retard at pleasure the growth, prosperity and welfare of cities and towns. In consideration of the franchise that they receive from the state, railroad companies agree to perform certain duties toward the public and the power of determining those duties and enforcing their performance is vested in the courts of the state.

The evidence shows that the elevator in question handles about 10500 bushels of grain each month, under the adverse circumstances under which the proprietors are compelled to work. It fairly appears that this business will be greatly increased when adequate facil-

ities are afforded it in handling and shipping grain, and that the business will be a continuing one. As said by the Supreme Court of Massachusetts, in Commonwealth *v.* Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555. "If the directors of a railroad were to find it for the interest of the stockholders to refuse to carry any freight or passengers, except such as they might take at one end of the
121 road and carry entirely through to the other end, and were to refuse to establish any way stations or do any business for that reason, though the road passed for a long distance through a populous part of the state, this would be a case manifestly requiring and authorizing legislative interference. * * * And on this same ground, if they refuse to provide reasonable accommodation for the people of any smaller locality, the legislature may reasonably alter and modify the discretionary power which the charter confers upon the directors so as to make the duty to provide the accommodation absolute. * * * The objection that it takes the property of the company and appropriates it to the benefit of others is not valid. The depot which they are required to build is to be their own, like all other depots, and their compensation for all their outlays is in their freights and fares."

The above remarks apply with equal force to the construction or extention of sidetracks required for the public convenience or necessity. We can see no valid objection to the enforcement of this statute and this case being a proper one, its provisions should be enforced. We recommend an affirmance of the judgment of the district court.

Good, C., and Epperson, G., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is affirmed.

122 In the Supreme Court of the State of Nebraska.

No. 15128.

State of Nebraska *ex Rel.* The Farmers' Elevator Company of Strausville, Nebraska, Appellee,

vs.

The Missouri Pacific Railway Company, Appellant.

I, H. C. Lindsay, clerk of the Supreme Court of the State of Nebraska do hereby certify that the above and foregoing is a full, true, correct and complete transcript of all pleadings and papers filed and all proceedings had in the above entitled cause as the same now remain on file and of record in my office.

Witness my hand and the seal of the Supreme Court of the State of Nebraska, hereto affixed at my office in Lincoln, this 9th day of April, A. D., 1908.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of the State of Nebraska,
By VICTOR SEYMOUR, *Deputy.*

123 In the Supreme Court of the State of Nebraska.

No. 15128.

STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA, Appellee,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Assignment of Errors.

Now comes the Appellant, The Missouri Pacific Railway Company, and files herewith its petition for a writ of error, and says that there are errors in the record and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, it makes the following statement and assignment of errors:

First. The Supreme Court of Nebraska erred in deciding and affirming the judgment of the court below, that the state courts of Nebraska have jurisdiction of the subject matter of the action commenced in the court below, and so decided in the said Supreme Court, and that said state courts have authority to hear, try and determine the issues thereof, thereby holding and determining that the legislature of the State of Nebraska had authority to enact laws for the government and control of the instrumentalities of an interstate railroad, including its switches, spurs, sidetracks and elevators.

Second. The Supreme Court of Nebraska erred in holding and deciding that notwithstanding the Congress has legislated upon the precise subject and afforded a complete remedy and designated the tribunal where such remedy may be afforded and invoked, the legislature likewise has authority to legislate upon the same subject and to compel the appellant to construct a switch-track upon its right-of-way on the application of a shipper, tendering interstate traffic, and also in holding and deciding that the writ of mandamus allowed and ordered by the court below commanding the appellant com-

124 pany to construct, maintain and operate such switch, was done in the rightful exercise of constitutional authority.

Third. The Supreme Court of the State of Nebraska erred in deciding that the subject matter of said suit was not governed by the provisions of the act of Congress to regulate commerce and of the acts amendatory and supplemental thereto.

Fourth. The Supreme Court of Nebraska erred in deciding and holding contrary to section 8 of article 1 of the Constitution of the United States and in opposition and repugnant to the acts of Congress to regulate commerce and of the acts amendatory and supplemental thereto, that the appellant company was under legal obligations to construct, operate and maintain a switch track from its line at Strausville, Nebraska, to the elevator of the Farmers' Elevator Company, of Strausville, and that its failure and refusal so to do was properly and legally required by the writ of mandamus granted and allowed by the court below.

Fifth. The Supreme Court of Nebraska erred in deciding that the appellant company was under legal obligations to construct, operate, and maintain a switch track from its line of railroad at Strausville, Nebraska, to connect with the Farmers' Elevator Company of Strausville, at said place for the purpose of transporting grain from such elevator to points beyond the state of Nebraska, and being in its nature interstate commerce.

Sixth. The Supreme Court of the State of Nebraska erred in deciding that Chapter 105 of the Session Laws of 1905, of Nebraska, was not repugnant to, nor in contravention of, nor in conflict with section 8 of article 1 of the Constitution of the United States and of the acts of Congress to regulate commerce and of the amendments thereto, when applied to the instrumentalities of an interstate carrier, as such is defined by said act to regulate commerce, as amended, and the acts supplementary thereto, approved June 30, 1906.

125 Seventh. The Supreme Court of Nebraska erred in holding and deciding that said Chapter 105 of the Laws of 1905 of Nebraska, and the enforcement of the provisions thereof is not objectionable as allowing the taking or damaging of private property of appellant company without just compensation to it, nor depriving a citizen of its property without due process of law, and further that said chapter in any such regard is not violative of, nor repugnant to, the provisions of the Fourteenth Article of amendment to the Constitution of the United States.

Eighth. The Supreme Court of Nebraska erred in holding and deciding that Section 1, Chapter 105 of the Laws of 1905 of Nebraska, is not subject to the objection of being special legislation, or allowing the taking of private property without just compensation, or of depriving the citizen of his property without due process of law.

Ninth. The Supreme Court of Nebraska erred in deciding under the facts and circumstances in the case:

"That in consideration of the franchise that they receive from the state, railroad companies agree to perform certain duties towards the public, and that the power of determining those duties and enforcing their performance is vested in the courts of the state."

Tenth. The Supreme Court of the State of Nebraska erred in deciding:

"That to deny to the state the power to require the erection of depots or construction of side-tracks and such other facilities as the public necessities require, would enable railway companies to create a monopoly in the handling of the products of the company adjacent to their lines and to turn it over to whoever they chose."

Eleventh. The Supreme Court of Nebraska erred in deciding and holding that Chapter 105 of the Laws of 1905 of Nebraska, which requires the appellant company without compensation to surrender a portion of its right-of-way and at its own expense to construct, maintain, and operate a switch track for the private use of the Farmers' Elevator Company of Strausville, Nebraska, is not repugnant to, or in violation of Section 21, of article 1 of the bill of rights of Nebraska, which provides:

126 "The property of no person shall be taken or damaged for public use without just compensation therefor."

Twelfth. The Supreme Court of Nebraska erred in assuming jurisdiction of said suit insofar as it involves the state or interstate commerce, to-wit: Requiring the appellant company to construct, maintain and operate a switch to connect with its interstate railroad at the station of Strausville, Nebraska, and to connect with the elevator of the Farmers' Elevator Company, of Strausville, Nebraska, for the carriage and transportation of grain from said elevator, all of which was tendered and intended for interstate shippers.

Thirteenth. The Supreme Court of Nebraska erred in deciding and holding that Chapter 105 of the Laws of 1905 of Nebraska, and other like statutes were not invalid insofar as they attempt to compel the appellant company to construct, maintain and operate one of the instrumentalities of an interstate railroad.

Fourteenth. The Supreme Court of Nebraska erred in holding and deciding that the judgment of the court below granting an order or writ of mandamus commanding the appellant company (without compensation) to construct, maintain and operate a switch connection at its station of Strausville, and to surrender a portion of its right-of-way for the private use of the Farmers' Elevator Company of Strausville, was not repugnant to, or in violation of the Fourteenth Article of Amendment- to the Constitution of the United States, and did not deny to the appellant company the equal protection of the laws, and was not depriving the appellant company of its property without due process of law, and was not in violation of, or repugnant to, section 8 of article 1, of the Constitution of the United States, which provides:

"The Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes."

127 For which above stated errors the appellant, The Missouri Pacific Railway Company, prays that the judgment of the Supreme Court of the State of Nebraska, dated March 19, 1908, be reversed, and that it be restored to all things which it has lost thereby.

A. R. TALBOT,
JAMES W. ORR,
B. P. WAGGENER,
Attorneys for the Missouri Pacific Railway Company, Appellant.

[Endorsed:] 15128 The State of Nebraska *ex rel.* The Farmers' Elevator Company *v.* The Missouri Pacific Railway Company Assignment of Errors. Supreme Court of Nebraska Filed Mar. 27 1908 H. C. Lindsay, Clerk.

128 In the Supreme Court of the State of Nebraska.

No. 15128.

STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA, Appellee,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Petition for Writ of Error.

The Missouri Pacific Railway Company, the above named appellant, considering itself aggrieved by the final decision of the Supreme Court of Nebraska, in rendering judgment against it in the above entitled case, hereby prays a writ of error from the decision and judgment to the Supreme Court of the United States, and an order fixing the amount of the supersedeas bond.

And the said The Missouri Pacific Railway Company, appellant, as grounds for the issuance of said writ of error, alleges the following errors in the record and proceedings of said cause.

First. The Supreme Court of Nebraska erred in deciding and affirming the judgment of the Court below that the state courts of Nebraska have jurisdiction of the subject matter of the action commenced in the court below, and so decided in the said Supreme Court, and that said state courts have authority to hear, try, and determine the issues thereof, thereby holding and determining that the legislature of the State of Nebraska had authority to enact laws for the government and control of the instrumentalities of an interstate railroad, including its switches, spurs, sidetracks and elevators.

Second. The Supreme Court of Nebraska erred in holding and deciding that notwithstanding the Congress has legislated upon the precise subject and afforded a complete remedy and designated the tribunal where such remedy may be afforded and invoked, the legislature likewise has authority to legislate upon the same sub-
129 ject and to compel the appellant to construct a switch track upon its right of way on the application of a shipper, tendering interstate traffic, and also in holding and deciding that the writ of mandamus allowed and ordered by the court below commanding the Appellant Company to construct, maintain and operate such switch, was done in the rightful exercise of constitutional authority.

Third. The Supreme Court of the State of Nebraska erred in deciding that the subject matter of said suit was not governed by the provisions of the act of Congress to regulate commerce and of the acts amendatory and supplemental thereto.

Fourth. The Supreme Court of Nebraska erred in deciding and holding contrary to section 8 of article 1 of the Constitution of the United States and in opposition and repugnant to the acts of Congress to regulate commerce and of the acts amendatory and supplemental thereto, that the appellant company was under legal obligations to construct, operate and maintain a switch track from its line at Straus-

ville, Nebraska, to the elevator of the Farmers' Elevator Company, of Strausville, and that its failure and refusal so to do was properly and legally required by the writ of mandamus granted and allowed by the court below.

Fifth. The Supreme Court of Nebraska erred in deciding that the appellant company was under legal obligations to construct, operate, and maintain a switch track from its line of railroad at Strausville, Nebraska, to connect with the Farmers' Elevator Company of Strausville, at said place for the purpose of transporting grain from such elevator to points beyond the state of Nebraska, and being in its nature interstate commerce.

Sixth. The Supreme Court of the State of Nebraska erred in deciding that Chapter 105 of the Session Laws of 1905, of Nebraska, was not repugnant to, nor in contravention of, nor in conflict with Section 8 of Article 1 of the Constitution of the United States and of the acts of Congress to regulate commerce and of the amendments thereto, when applied to the instrumentalities of an interstate
130 carrier, as such is defined by said acts to regulate commerce, as amended, and the acts supplementary thereto, approved June 30, 1906.

Seventh. The Supreme Court of Nebraska erred in holding and deciding that said Chapter 105 of the Laws of 1905 of Nebraska, and the enforcement of the provisions thereof is not objectionable as allowing the taking or damaging of private property of the appellant company without just compensation to it, nor depriving a citizen of its property without due process of law, and further that said chapter in any such regard is not violative of, nor repugnant to, the provisions of the Fourteenth Article of amendment to the Constitution of the United States.

Eighth. The Supreme Court of Nebraska erred in holding and deciding that section 1, Chapter 105 of the Laws of 1905 of Nebraska, is not subject to the objection of being special legislation, or allowing the taking of private property without just compensation, or of depriving the citizen of his property without due process of law.

Ninth. The Supreme Court of Nebraska erred in deciding under the facts and circumstances in the case:

"That in consideration of the franchise that they receive from the state, railroad companies agree to perform certain duties towards the public, and that the power of determining those duties and enforcing their performance is vested in the courts of the state."

Tenth. The Supreme Court of the State of Nebraska erred in deciding:

"That to deny to the state the power to require the erection of depots or construction of sidetracks, and such other facilities as the public necessities require, would enable railway companies to create a monopoly in the handling of the products of the company adjacent to their lines and to turn it over to whoever they chose."

Eleventh. The Supreme Court of Nebraska erred in deciding and holding that Chapter 105 of the Laws of 1905 of Nebraska, which requires the appellant company, without compensation, to surrender a portion of its right-of-way and at its own expense to construct, main-

tain, and operate a switch track for the private use of the Farmers' Elevator Company of Strausville, Nebraska, is not repugnant to, or in violation of Section 21, of Article 1, of the Bill of Rights of Nebraska, which provides:

131 "The property of no person shall be taken or damaged for public use without just compensation therefor."

Twelfth. The Supreme Court of Nebraska erred in assuming jurisdiction of said suit in so far as it involves the state or interstate commerce, to-wit: Requiring the appellant company to construct, maintain and operate a switch to connect with its interstate railroad at the station of Strausville, Nebraska, and to connect with the elevator of the Farmers' Elevator Company of Strausville, Nebraska, for the carriage and transportation of grain from said elevator, all of which was tendered and intended for interstate shipment.

Thirteenth. The Supreme Court of Nebraska erred in deciding and holding that Chapter 105 of the Laws of 1905 of Nebraska, and other like statutes were not invalid in so far as they attempt to compel the appellant company to construct, maintain and operate one of the instrumentalities of an interstate railroad.

Fourteenth. The Supreme Court of Nebraska erred in holding and deciding that the judgment of the court below granting an order or writ of mandamus commanding the appellant company (without compensation) to construct, maintain and operate a switch connection at its station of Strausville and to surrender a portion of its right-of-way for the private use of the Farmers' Elevator Company of Strausville, was not repugnant to, or in violation of the Fourteenth article of amendment to the Constitution of the United States, and did not deny to the appellant company the equal protection of the laws and was not depriving the appellant company of its property without due process of law, and was not in violation of, or repugnant to, Section 8 of article 1, of the Constitution of the United States, which provides:

"The Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes."

132 For which errors the said, The Missouri Pacific Railway Company, appellant, prays that the said judgment of the Supreme Court of the State of Nebraska, dated, promulgated and filed March 19, 1908, be reversed and it be restored to all things it has lost thereby.

A. R. TALBOT,
JAMES W. ORR,
B. P. WAGGENER,
Attorneys for Missouri Pacific Railway Company, Appellant.

STATE OF NEBRASKA, *Supreme Court, ss:*

Let the writ of error above prayed for issue upon the execution of a bond by The Missouri Pacific Railway Company to the state of

Nebraska, in the sum of Two Thousand ($2,000.00) Dollars. Such bond when approved to asct as a supersedeas.

Dated this 26th day of March, 1908.

JOHN B. BARNES,
Chief Justice Supreme Court of Nebraska.

[Endorsed:] 15128 State *ex rel.* The Farmers' Elevator Company *v.* The Missouri Pacific Railway Company Petition for writ of error Supreme Court of Nebraska Filed Mar. 27 1908 H. C. Lindsay, Clerk.

133 In the Supreme Court of the State of Nebraska.

No. 15128.

STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Bond.

Know all men by these presents, That we, The Missouri Pacific Railway Company, as principal, and the National Surety Company, of New York, as sureties, are held and firmly bound unto the State of Nebraska, Appellee, in the sum of Two Thousand ($2,000.00) Dollars, to be paid to it the said State of Nebraska, to which payment well and truly to be made, we bind ourselves, our successors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this 25th day of March 1908.

Whereas, the above bounden appellant in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Nebraska, in favor of said State of Nebraska *ex rel.* The Farmers' Elevator Company of Strausville, Nebraska, against the Missouri Pacific Railway Company, and to supersede the said judgment rendered therein.

Now, therefore, the condition of this obligation is such that if the above named appellant in error shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged against it, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

THE MISSOURI PACIFIC RAILWAY COMPANY,
[SEAL.] By JAMES W. ORR, *Its Attorney.*
NATIONAL SURETY COMPANY,
By EDWARD P. HOVEY, *Attorney in Fact,*
A. R. TALBOT, *Attorney in Fact,*
Sureties.

Bond approved and to operate as a supersedeas.
JOHN B. BARNES,
Chief Justice of the Supreme Court of Nebraska.

[Endorsed:] 15128 State *ex rel.* The Farmers' Elevator Company *v.* The Missouri Pacific Railway Company Bond Supreme Court of Nebraska Filed Mar. 27 1908 H. C. Lindsay Clerk.

134 In the Supreme Court of the State of Nebraska.

No. 15128.

STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA, Appellee,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Journal Entry of Allowance of Writ of Error and Superseding Judgment.

The appellant, The Missouri Pacific Railway Company, having presented its application for a writ of error to the Supreme Court of the State of Nebraska to correct the judgment rendered by the said court against it in the suit wherein the State of Nebraska *ex rel.* The Farmers' Elevator Company of Strausville, was appellee, and the the Missouri Pacific Railway Company was appellant, and having presented with its application its due assignment of errors in that regard, present now a citation to be signed; accordingly it is ordered that said writ of error be allowed and said citation signed upon the said appellant giving the said appellee a good and sufficient bond in the sum of $2,000.00, conditioned that said appellant shall prosecute its writ of error to effect, and if it fail to make good its plea shall answer all damages and costs, said security and bond to be approved by this court, or one of the justices thereof, and the writ thereunder to be a supersedeas; and thereupon said appellant now presents a bond with a good and sufficient surety in the sum of $2,000.00, as aforesaid, which is approved by the chief justice and ordered filed with the clerk of the Supreme Court of the State of Nebraska.

Approved this 26 day of March, 1908.

JOHN B. BARNES,
Chief Justice of Supreme Court, Nebraska.

[Endorsed:] 15128 State *ex rel.* The Farmers' Elevator Co. *v.* The Missouri Pacific Railway Company Order allowing writ of error Supreme Court of Nebraska Filed Mar. 27 1908 H. C. Lindsay, Clerk.

135 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said state, in

which a decision could be had in the certain suit between the State of Nebraska, *ex rel.* The Farmers' Elevator Company, of Strausville, Nebraska, appellee, and the Missouri Pacific Railway Company, appellant, wherein was drawn in question the construction of a clause of the Constitution of the United States, and likewise the construction of the Acts of Congress of the United States enacted in pursuance of such Constitution, and wherein was also drawn in question the validity of a statute of the State of Nebraska, and of an authority exercised under said state and statute, on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was against the title, right, privilege, or exemption specifically set up or claimed under the Constitution and under said statute, and said decision was likewise in favor of the validity of the statute of said state, and the authority exercised under it, a manifest error hath happened to the great damage of the Missouri Pacific Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of
136 the Supreme Court of the United States, this 26 day of March in the year of our Lord one thousand nine hundred and eight.

[Seal United States Circuit Court, District of Nebraska, Lincoln Division.]

GEO. H. THUMMEL, *Clerk.*
J. H. McCLAY,
Dep. Clerk of the Circuit Court of the United States, District of Nebraska.

Allowed:
JOHN B. BARNES,
Chief Justice Supreme Court of Nebraska.

[Endorsed:] 15128 State *ex rel.* The Farmers' Elevator Company *v.* The Missouri Pacific Railway Company. Writ of error Supreme Court of Nebraska Filed Mar. 27 1908 H. C. Lindsay, Clerk.

137 SUPREME COURT, *State of Nebraska, ss:*

I, H. C. Lindsay, Clerk of the Supreme Court, do hereby certify that there was lodged with me as such clerk on March 27, A. D. 1908, in the case of State of Nebraska, *ex rel.* The Farmers' Elevator Company of Strausville, Nebraska, Appellee, *vs.* The Missouri Pacific Railway Company, Appellant.

1. The original bond of which copy is herein set forth.
2. Two copies of the writ of error as herein set forth, one for the appellant and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court in Lincoln, Nebraska, this 9th day of April, 1908.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of Supreme Court of Nebraska,
By VICTOR SEYMOUR, *Deputy.*

138 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to The State of Nebraska, *ex rel.* The Farmers' Elevator Company of Strausville, Nebraska, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Nebraska, wherein the Missouri Pacific Railway Company, is appellant, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Nebraska, this 26 day of March, 1908.

[Seal Supreme Court of Nebraska.]

JOHN B. BARNES,
Chief Justice Supreme Court of Nebraska.

Attest:
H. C. LINDSAY,
Clerk Supreme Court of Nebraska,
By VICTOR SEYMOUR, *Deputy.*

FALLS CITY, NEB., *April* 6, 1908.

R. C. James and C. Gillispie, Attorneys of record, for the appellee, in the above mentioned case, hereby acknowledge due service of the above citation, and enter an appearance on behalf of the said appellee in the Supreme Court of the United States. Service also on us of a copy of the petition for writ of error, assignments of error, writ of error and bond acknowledged.

R. C. JAMES &
C. GILLISPIE,
Attorneys for Appellee, The State of Nebraska ex Rel. The Farmers' Elevator Company of Strausville, Nebraska.

Supreme Court of Nebraska Filed Apr. 8 1908
H. C. LINDSAY, *Clerk.*

[Endorsed:] 15128 The State of Nebraska *ex rel.* The Farmers' Elevator Company *v.* The Missouri Pacific Railway Company Citation Supreme Court of Nebraska Filed Apr. 8 1908 H. C. Lindsay, Clerk.

139 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Nebraska, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Nebraska, in the City of Lincoln, this 9th day of April, 1908.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska,
By VICTOR SEYMOUR, *Deputy.*

Clerk's fees for preparing this transcript, $42.00.

Endorsed on cover: File No. 21,110. Nebraska supreme court. Term No. 346. The Missouri Pacific Railway Company, plaintiff in error, *vs.* The State of Nebraska *ex. rel.* The Farmers' Elevator Company of Strausville, Nebraska. Filed April 13th, 1908. File No. 21,110.

FILED.
AUG 17 1908
JAMES H. McKENNEY

In the Supreme Court of the United States

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE STATE OF NEBRASKA,
Defendant in Error.

No. 127

BRIEF OF PLAINTIFF IN ERROR.

BALIS P. WAGGENER,
JAMES W. ORR,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE STATE OF NEBRASKA,
Defendant in Error.

No. 345.

STATEMENT.

The Manley Co-operative Grain Company of Manley, Nebraska, is a private corporation duly organized and chartered under the laws of Nebraska. On the 23d day of October, 1905, it caused to be served upon the railway company a notice or demand—a copy of which is as follows, to-wit (Abst., p. 65):

"The Manley Co-operative Grain Association.
C. M. Andrus, Mgr.

Manley, Nebr., Oct. 23d, 1905.

To the Officers of the Missouri Pacific Railroad Co.

Gentlemen: The members of this association hereby make application for a lease to ground on the right-of-way of the Missouri Pacific R. R. in Manley, Neb., the ground to be used as a building site for a grain elevator.

An early reply will be appreciated.
THE MANLEY CO-OPERATIVE GRAIN ASSOCIATION,
By J. B. Cleghorn, Secretary.
Manley, Nebr."

And, such request not having been complied with on the 8th day of November, 1905, a demand was served upon the company for the construction of a side track from the main line of the defendant company, across its right-of-way, to an elevator alleged to have been constructed by the said co-operative association. This demand not having been complied with, on the 17th day of May, 1906, there was filed in the District Court of Cass County, Nebraska, a petition or complaint—which is in words and figures as follows (Abst., pp. 1-2):

"The State of Nebraska, Plaintiff, vs. The Missouri Pacific Railway Company, Defendant.

The plaintiff complains and alleges:

First. That the defendant, the Missouri Pacific Railway Company, is a corporation duly organized and authorized to do business in the State of Nebraska; that said defendant has constructed and now operates lines of railroad in Cass County, Nebraska, and has so operated such lines of railroad for a number of years last past; that defendant has established stations along said line of railroad, and established and for a number of years has maintained, and now maintains, a station, depot and side tracks at the village of Manley, in Cass County, Nebraska, and at such station receives from the public, for ship-

ment, grain, merchandise and stock, and there transacts a general freight business.

Second. That the Manley Co-operative Grain Association of Manley, Nebraska, is a corporation duly organized and authorized to transact business in Cass County, in the State of Nebraska, and is authorized to buy, sell and ship grain, buy, construct and lease elevators for the storage and shipment of grain of all kinds, and secure real estate for the location thereof; that said Manley Co-operative Grain Association is now in the active business of buying, selling and shipping grain over the road of defendant railway company.

Third. That the said Manley Co-operative Grain Association of Manley, Nebraska, requested of said defendant a site on the right-of-way of defendant on which to build an elevator for receiving and shipping grain, which request was denied; whereupon said The Manley Co-operative Grain Association secured the control of land adjacent to the right-of-way of defendant at Manley, Nebraska, constructed an elevator thereon with a capacity of not less than fifteen thousand bushels of grain, and on the 9th day of February, A. D. 1906, notified said railway company, defendant herein, that said The Co-operative Grain Association had completed its elevator and was ready to receive grain and ship it from said elevator, and requested defendant to erect, equip and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of defendant's right-of-way where the said Manley Co-operative Grain Association had constructed its said elevator, so said association could load cars from said elevator, and ship the same over the road of defendant.

Fourth. That more than sixty days have elapsed since the serving of said notice and request,

and the said defendant railway company neglected and refused, and still neglects and refuses, to erect, equip and maintain a side track or switch to the said elevator of The Manley Co-operative Grain Association of suitable length to approach as near as four feet of the outer edge of defendant's right-of-way against the form of the statutes in such case made and provided.

Fifth. That hereby the defendant became indebted to the plaintiff in the sum of five hundred dollars, whereby an action accrued to the plaintiff according to the provisions of Sections one (1) and one e (1e) of Chapter 72, Art. 5, Compiled Statutes of Nebraska for 1905.

Wherefore plaintiff demands judgment against the defendant in the sum of five hundred dollars, with costs of action.

THE STATE OF NEBRASKA,
By C. A. Rawls, County Attorney."

And thereafter the defendant railway duly filed its answer (Abst., pp. 4-8), and, issue being joined thereon, the matters and things in controversy were tried before the court without a jury. Thereafter, on the 20th day of December, 1906, the following decree and judgment was entered against the railway company, viz. (Abst., p. 10):

"DECREE.

And now on the 20th day of December, A. D. 1906, it being one of the days of the regular September, A. D. 1906, term of this court, this cause came on for decision, the court having

taken said cause under advisement, and the court being fully and well advised in the premises, and in consideration of the evidence and argument of counsel, the court finds the issues in favor of the plaintiff, and the court finds the defendant guilty as charged in the complaint.

It is therefore considered, ordered and adjudged that plaintiff have and recover from the defendant the sum of $500.00, together with costs of this action, taxed at $———.

To all of which defendant excepts, and forty days from the rising of the court is given to prepare and serve bill of exceptions."

An appeal was taken from this judgment and decree to the Supreme Court of Nebraska, and thereafter the said decree and judgment of the District Court was affirmed by the Supreme Court of Nebraska, as follows (Abst., p. 72):

"This cause coming on to be heard, upon appeal from the District Court of Cass County, was argued by counsel, and submitted to the court; upon due consideration whereof the court doth find no error apparent in the record of the proceedings and judgment of the said District Court. It is therefore considered, ordered and adjudged that the said judgment of the District Court be and the same is hereby affirmed; that appellee pay all costs incurred by it, taxed at $———, and have and recover of and from the appellant all its costs so expended herein; that appellant pay all costs incurred herein by it, taxed at $———, for all of which execution is hereby awarded, and that a mandate issue accordingly."

Proceedings in error were instituted in this court to review the judgment and decision of the Supreme Court of Nebraska.

ASSIGNMENT OF ERRORS.

First.

The Supreme Court of Nebraska erred in deciding and affirming the judgment of the court below; that the state courts of Nebraska have jurisdiction of the subject matter of the action commenced in the court below, and so decided in the said Supreme Court, and has authority to hear, try and determine the issues thereof, and thereby holding and determining that the legislature of the State of Nebraska had authority to govern and control the instrumentalities of an interstate railroad, including its switches, spurs, side tracks and elevators.

Second.

The Supreme Court of Nebraska erred in holding and deciding that, notwithstanding the Congress has legislated upon the precise subject, and afforded a complete remedy, and designated the tribunal where a remedy may be afforded, the state legislature likewise has authority to legislate upon the same subject, and to compel the construction of a switch track, upon the

application of a shipper, rendering interstate as well as intra-state traffic, and also holding that the fine imposed upon the appellant company for its refusal to construct such switch was done in the rightful exercise of constitutional authority.

Third.

The Supreme Court of Nebraska erred in deciding that the subject matter of said suit was not governed by the provisions of the act of Congress to regulate commerce, and of the acts amendatory and supplemental thereto.

Fourth.

The Supreme Court of Nebraska erred in deciding, contrary to Section 8 of Article 1 of the Constitution of the United States, and contrary to the acts of Congress to regulate commerce, and the amendments thereto, that the appellant company was under legal obligations to construct, operate and maintain a switch track from its line at Manley, Nebraska, to the elevator of the Manley Co-operative Grain Association, and that its failure so to do would subject it to the penalties fixed by the act of the Nebraska legislature passed in relation thereto.

Fifth.

The Supreme Court of Nebraska erred in deciding that the appellant company was under legal obligations to construct, operate and maintain a switch track from its line of railroad at Manley, Nebraska, to connect with the elevator of the Manley Grain Association at said place, for the purpose of transporting grain from such elevator, at least fifty per cent of which was to be transported to points beyond the State of Nebraska, and being in its nature interstate commerce.

Sixth.

The Supreme Court of Nebraska erred in deciding

that Chapter 105 of the Session Laws of 1905 of Nebraska was not repugnant to, nor in contravention of, nor in conflict with Section 8 of Article 1 of the Constitution of the United States and of the acts of Congress to regulate commerce, and of the amendments thereto, when applied to the instrumentalities of an interstate carrier, as such is defined by the act to regulate commerce as amended, and the acts supplementary thereto, approved June 30th, 1906.

Seventh.

The Supreme Court of Nebraska erred in holding and deciding that the said Chapter 105 of the Laws of 1905 of Nebraska, and the enforcement of the provisions thereof, is not objectionable as allowing the taking or damaging of private property of the appellant company without just compensation to it, nor as depriving a citizen of its property without due process of law, and further, that said chapter, in this regard, is not violative of, nor repugnant to, the provisions of the fourteenth article of amendment to the Constitution of the United States.

Eighth.

The Supreme Court of Nebraska erred in holding and deciding that said Chapter 105 of the Laws of 1905 of Nebraska, which requires the appellant company, without compensation, to surrender a portion of its right-of-way, and, at its own expense, construct, maintain and operate a switch track for the private use of the Manley Co-operative Grain Association at Manley, Nebraska, is not repugnant to or in violation of Section 21 of the Bill of Rights of Nebraska, which provides:

> "The property of no person shall be taken or damaged for public use without just compensation therefor."

Ninth.

The Supreme Court of Nebraska erred in deciding

that said Chapter 105 of the Laws of 1905 of Nebraska, which requires the appellant company to construct, maintain and operate a switch to any elevator, constructed as near as four feet of the outer edge of the company's right-of-way, provided that any such elevator so constructed, after the taking effect of said act, in order to receive the benefits of said act, must have a capacity of not less than 15,000 bushels, containing such proviso is not repugnant to or in conflict with that part of Section 15 of Article 3 of the Constitution of Nebraska, which provides, among other things:

> "That the legislature shall not pass local or special laws, nor grant to any corporation, association or individual, any special or exclusive privileges, immunities or franchises whatsoever."

Tenth.

The Supreme Court of Nebraska erred in assuming jurisdiction of said suit in so far as it involves the subject of interstate commerce, to-wit: Requiring the appellant company to construct, maintain and operate a switch to connect with its interstate railroad at the station at Manley, Nebraska, to connect with the elevator of the Manley Co-operative Grain Association at that point for the carriage and transportation of grain from said elevator, which was at least fifty per cent interstate traffic.

Eleventh.

The Supreme Court of Nebraska erred in deciding that Chapter 105 of the Laws of 1905 of Nebraska, and other like statutes, were not invalid, in so far as they attempt to compel the appellant company to construct, maintain and operate one of the instrumentalities of an interstate railroad.

BRIEF AND ARGUMENT.

In order to avoid repetition, the assignment of errors will be condensed and considered under two subdivisions.

First.

The Statute of Nebraska, the basis of the proceeding in the State Court, in terms, and as construed by that Court, operated in taking the property of the Railway Company for a private use, without its consent, and without compensation, in violation of the Fourteenth Article of Amendment of the Constitution of the United States.

The statute under which the proceeding or prosecution was instituted in the State Court is as follows, viz.:

> "Every railroad corporation shall give to all persons and associations reasonable and equal terms for the transportation of any merchandise or other property, of every kind and description, upon any railroad owned or operated by such corporation within this state, and for terminal handling the use of the depot and other buildings and grounds of such corporation, and at any point where its railroad shall connect with any other railroad, reasonable and equal terms and facilities of interchange, and shall promptly forward merchandise consigned or directed to be sent over

another road connecting with its road according to the directions therein or accompanying the same; and every railroad company or corporation operating a railroad in the State of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right-of-way, and the same not having been granted within a limit of sixty days, the railroad company to whom application has been made shall erect, equip and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of their right-of-way when necessary, and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants adjacent to their right-of-way for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favoritism or discrimination in any respect whatever. Provided, however, that any elevator *hereafter* constructed, in order to receive the benefits of this act, must have a capacity of not less than fifteen thousand bushels." (Sec. 4702, Comp. Stat. Neb., 1905.)

"Any railroad company, officer or agent thereof, who willfully violates or evades any of the provisions of this act shall be liable to the party injured for all damages sustained by reason of such violation, and, in addition thereto, shall be liable, for each offense, to a

> penalty of five hundred dollars, which may be recovered by the county attorney in an action brought in the name of the State of Nebraska in any county by an action in the District Court where such railroad company or corporation is doing business." (Sec. 4702e, Comp. Stat. Neb., 1905.)

It is alleged, and conceded, that the Manley Co-operative Grain Association of Manley is a private corporation chartered and organized under the laws of Nebraska.

We challenge the validity of the statutes, and contend that the same are in conflict with the Constitution of the United States, and therefore void. No provision is made for any notice to the railway company or for any hearing before any tribunal, judicial or administrative, before liability attaches under the statute. The statute provides, in substance, that unless the railway company shall, on demand, surrender its private grounds for a permanent site for an elevator, to be owned by a private association, it shall, as a penalty for such refusal, "erect and maintain a side track or switch of suitable length to approach as near as four feet to the outer edge of their right-of-way, when necessary, and in *all* cases to approach as near *as necessary* to approach an elevator that may be erected by the applicant or applicants adjacent to their right-of-way for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevator, or handling and shipping grain, without favoritism or discrimination in any respect whatever."

All this the railway company must do, or give up

and permanently surrender a portion of its private grounds for an elevator site. The requirements of this statute are conclusive. The question of safety, feasibility, reasonableness or necessity does not, under any conditions, become a factor. The statute confers upon the owner of the elevator the absolute and arbitrary power to conclusively determine when, where and under what conditions the railway company shall surrender its grounds for an elevator site, or construct and maintain a side track over and across its right-of-way, for the private use of the owner of an elevator *to be* constructed anywhere adjacent to the right-of-way.

Does not the Nebraska statute come squarely within the decision of this Court in *C., M. & St. P. R. R.* v. *Minnesota*, 134 U. S., 418? As construed by the Supreme Court of Nebraska—in fact, by the very terms of the statute—is not the railway company deprived of the use of its property, and in effect the property itself, without any judicial investigation, or any kind of investigation, as to the reasonableness of or necessity for such appropriation? In the Minnesota case, *supra*, it was said that:

> "A law which, as construed by the Supreme Court of the state, allows a railroad commission to establish rates for railroads which are final, without issue made or inquiry had as to their reasonableness, and forbids the courts to stay the hands of the commission if the rates established by it are unequal, and unreasonable, conflicts with the Constitution of the United States.
>
> So construed, it deprives the company of its right to a judicial investigation by due process of

law, and substitutes therefor, as an absolute finality, the action of a railroad commission which is not clothed with judicial functions and does not possess the machinery of a court of justice.

Where no hearing is provided for, no summons or notice to the company, before the commission has found what it is to find, and declared what it is to declare, and no opportunity provided for the company to introduce witnesses before the commission, there is not the semblance of due process of law.

The question of the reasonableness of a rate of charge for transportation by a railroad company is eminently a question for judicial investigation, requiring due process of law for its determination.

If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of a judicial investigation, it is deprived of the use of its property and, in effect, of the property itself, without due process of law, and in violation of the Constitution of the United States."

And it was further said that:

"This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation."

Hartford Ins. Co. v. *R. R. Co.*, 175 U. S., 99.

It cannot be said that the trial in the State Court for a violation of the statute is due process of law, for, by the very terms of the statute, all defenses are foreclosed, except that the railway company has *in fact* complied with the requirements of the statute. The statute "neither contemplates nor allows any issue to

be made or inquiry to be had" as to the reasonableness or safety of the "side track or switch" demanded. (134 U. S., 456.) On a trial, under the statute, there is no fact to traverse except the violation of the law in not complying with the demand of the person who wants the "side track or switch."

In *ex parte Young*, 209 U. S., 148, there was no way to test the reasonableness of the rates, except by violating the law. In that case this Court said to impose upon a "party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given), only upon the condition that, if unsuccessful, he must suffer imprisonment, and pay fines, as provided by these acts, is, in effect, to close all approaches to the courts, and thus prevent any hearing upon the question whether the rates, as provided by the acts, are not too low, and therefore invalid."

The Nebraska statute is even more arbitrary than the statute under consideration in *ex parte Young, supra*, because, as before stated, as construed by the State Court, there was but the one issue to be tried (not whether the statute should or should not be enforced, as applied to the facts of each particular case), viz., the violation or disregard of the strict letter of the statute. A law which "hears before it condemns" is due process of law. A law which condemns before it hears is *not* due process of law, under the guarantees of the Federal Constitution. "To give to the clause of the Constitution which guarantees that 'no person shall be deprived of life, liberty or property without due process of law' any value, it must be understood to mean that no person shall be deprived, by any form

of legislation or governmental action, of either life, liberty or property, except as a consequence of some judicial proceeding, appropriately and legally conducted. It shows that *a law which, by its own inherent force, extinguishes rights of property, or compels their extinction, without any legal process whatever, comes directly in conflict with the Constitution.*"

The statute of Nebraska, *by its own inherent force,* deprives the railway company of the beneficial use of its property, without any opportunity to be heard, and turns over such use to a private purpose, without any compensation.

The railway company, on the trial for violation of the statute, cannot be heard to show that its terminal grounds and yards are so laid out and operated that, to comply with the demand of "*all* persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain, etc.," "for a side track or switch of suitable length, etc.," would disable it from discharging its duties to the public as a common carrier, and cause it irreparable loss and damage. The safety of the traveling public may not be considered, but all such matters are subordinated to the whim or caprice of any person who wants, or thinks he wants, a side track or switch to his elevator. The construction and operation of terminals at stations is the most important part of railroad construction and operation, and requires great engineering skill and experience; and no such statute, as a matter of public policy, should be sustained which does not delegate to or vest in some tribunal, judicial or administrative, the power, upon due notice to the railway company, "to hear and inves-

tigate the same, and determine as to the safety and practicability thereof, and justification and reasonable compensation therefor," as is provided in Section 1 of the Hepburn Bill.

If the Nebraska statute is valid, when will the right conferred by it be exhausted? There is in the statute no restriction or limitation as to the number of elevators to be thus accommodated at the expense of the railway company. If one has the privilege and right, under this statute, so has another—and so on *ad infinitum*. Every farmer who owns land abutting on the right-of-way of the railway company, whether at a station or between stations, may avail himself of the rights and privileges conferred by the statute, and no tribunal, judicial or administrative, has the right, power or jurisdiction, under the statute, to hear and determine as to the *necessity* of another elevator, or as to the *reasonableness* of the demand.

If the validity of this law is sustained, the control and management of railroad property will be turned over to every farmer who wants or imagines he wants side tracks to elevators. But has not this Court settled this controversy in the case of *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S., 403?

It is proposed by the Manley Co-operative Grain Association to take 250 feet of the right-of-way of the defendant company and to require the railroad company, at its own cost and expense of something more than $450, to construct and thereafter operate and maintain a switch track upon its right-of-way or depot grounds at Manley, to connect with the elevator company's elevator; and this without compensation or any

other provision of law other than that authorized by Section 1 of Article 5 of Chapter 72 of the Session Laws of Nebraska, 1905. That the same when so constructed would be of no benefit or advantage to the defendant company, nor use to it in serving the general public, but would be for the private advantage and use of the elevator company, and entirely unnecessary for serving the general public, or in the discharge of its duties to the public. In addition to this, it is proposed to require the railroad company to forever maintain and operate this track without compensation or reward, and it will be understood that no offer is made to in any manner compensate the defendant company for the loss of its right-of-way, building materials, expense of construction, nor cost of maintenance and operation.

It will be observed that Section 1, *supra*, provides as follows:

> "And every railroad company or corporation operating a railroad in the State of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, and who are engaged in operating grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right-of-way, and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made shall erect, equip and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of their right of way, when necessary," etc.

The alternative arrangement of this section was evidently made for the purpose of avoiding the decision of the Supreme Court of the United States in the case of the *Missouri Pacific Railway Company, Plaintiff in Error,* v. *State of Nebraska ex rel. Board of Transportation of the State of Nebraska, Defendant in Error,* found in 164 U. S. Supreme Court, at page 404, but fails entirely to accomplish that purpose.

The Elmwood Farmers' Alliance of Elmwood, Nebraska, made application to the Missouri Pacific Railway Company for a site on its right-of-way at Elmwood, upon which to construct and operate an elevator, which request was denied, and thereafter petition was filed with the State Board of Transportation for an order requiring the railway company to grant such request, which order was promptly made by the state board, but was not obeyed by the railway company; thereupon the State Board of Transportation filed its petition in the Supreme Court, in the name of the state, for a peremptory writ of mandamus, requiring the railroad company to comply with the order of the board, to grant to the Farmers' Alliance an elevator site upon its right-of-way, without compensation and with no other process of law than that. The Supreme Court of Nebraska, of course, promptly granted the writ, Judge Maxwell writing the opinion, and the railroad company was given forty days in which to comply.

State ex rel. Board of Transportation v. *Mo. Pac. Ry. Co.,* 29 Neb., 550.

Error was prosecuted from the Supreme Court of the United States, the writ allowed, and in the decision *(The Mo. Pac. Ry. Co.* v. *State of Neb. ex rel.,* 164 U. S., 404) it was held:

> "An order of the Nebraska State Board of Transportation under the State Statute of March 31, 1887, requiring the railroad company to surrender a part of its land to private persons for the purpose of building and maintaining their elevator upon it, is a taking of private property of the company for the private use of such persons. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law and is a violation of the Fourteenth amendment of the Constitution of the United States."

As in the case at bar, the defendant company had granted to other companies or corporations doing business at Elmwood sites for two elevators, which were being operated at the time, but this Court, in the opinion, says:

> "A railroad corporation doubtless holds its station grounds, tracks and right-of-way as its private property, but for the public use for which it was incorporated; and may, in its discretion, permit them to be occupied by other parties with structures convenient for the receipt and delivery of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers. *(Grand Trunk R. Co.* v. *Richardson,* 91 U. S., 454.) But how far the railroad company can be compelled to do so, against its will, is a wholly different question. Upon the admitted facts of the case at bar, the railroad company had granted to two private firms the privilege of erecting elevators upon its right-of-way at Elmwood Station, and had refused an application of other private persons, farmers in the neighborhood, for the

privilege of erecting on that right-of-way a third elevator of sufficient capacity to store from time to time the grain produced upon their farms and upon those of their neighbors; and has been ordered by the Board of Transportation, and by the Supreme Court of the state, to grant to the applicants a location upon its right-of-way for the purpose of erecting thereon such an elevator, upon the like terms and conditions as to its grants to the owners of the two existing elevators.

To require the railroad company to grant to the petitioners a location on its right-of-way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property, and for a public use, to an association of private individuals for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control of the use of such land, or of the building to be erected thereon, to the railroad company for the accommodation of its own business, or for the convenience of the public.

This court, confining itself to what is necessary for the decision of the case before it, is unanimously of the opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a state of the private property of one person or cor-

> poration, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth article of amendment to the Constitution of the United States."

The case at bar is a more flagrant violation of the rights of the defendant, if possible, than was attempted in the Elmwood case. Here they not only take 250 feet of defendant's right-of-way and appropriate the perpetual use thereof to the private use of the Manley Co-operative Grain Association, but, in addition, require the railroad company, at its own expense, to construct and thereafter maintain and operate a track thereon. The Constitution of the State of Nebraska provides that the property of no person shall be taken *or damaged* for public use without just compensation therefor. The proposition before the Court is not only to take and damage defendant's property, but it is to be done for the *private* use of the Manley Elevator Company, and that without compensation or due process of law.

So it will be seen that it was the purpose of the legislature to enable the applicant to avoid the decision in the Elmwood case by building an elevator on ground contiguous to the defendant's right-of-way and requiring the defendant company to construct its track thereto and to surrender a portion of its right-of-way without compensation.

It should be borne in mind that there is no question of rates to be made nor facilities to be furnished by the railroad company for the transportation of passengers or freight connected with the questions pre-

sented in this case; there is no complaint made that the facilities furnished for the elevation and storage of grain are not sufficient to accommodate the business brought to that station. It is not a question of additional or better or different railroad facilities. It is not intended that the railroad company should have any control over this elevator to aid in or facilitate the movement of freight. It is to be purely a private concern, operated by private persons for private gain, and in no manner connected with the public or the railroad company.

In *Mann* v. *Pere Marquette R. Co.*, 135 Mich., 210-219, it was held:

> "The railroad company is not a common carrier as to private sidings or spur tracks, and the state has no power to force a railroad company to deliver its cars thereon." Citing *Jones* v. *Newport News, etc., R. Co.*, 65 Fed. Repr., 136; *Mercantile Trust Co.* v. *Columbus S. & H. R. Co.*, 91 Fed. Repr., 148; *McNeil* v. *R. R. Co.*, 202 U. S., 543; *L. & N. R. R.* v. *Stock Yards*, 212 U. S., 132.

Article 5 of Chapter 72 of the Compiled Statutes of Nebraska, 1905, makes no provisions for compensation to the railroad company, nor is any intended to be made to such company for parting with its right-of-way, its money and the perpetual use and cost of maintenance and operation of a considerable portion of its right-of-way. The elevator company is not under obligation to even ship over defendant's line of railway. No provision is made for the exercise of the power of eminent domain by elevator companies; no pretense in the law that it is a public or quasi public corporation, impressed with public duties, nor that it in any manner serves the public.

The provision of the state constitution which says "the property of no person shall be taken or damaged *for public use* without just compensation therefor" means precisely what it says. In no event can it be taken, *except for public use*, nor can it be damaged *except for a public use*, nor can it be either taken or damaged for *even a public use without just compensation.*

In *C. K. & N. R. R. Co.* v. *Hazels*, 26 Neb., 354, it was held:

> "The words 'or damaged,' in Section 21, Article 1, of the Constitution, include all damages arising from the exercise of the right of eminent domain which causes a diminution in the value of private property.
>
> For the purpose of arriving at the diminution of the value of real estate damaged by the construction of a railroad, in estimating the value of the property after the construction of such road, it is proper to take into consideration all elements of damage caused by such construction, which tend to diminish the value of the property."

In *Gottschalk* v. *C. B. & Q. R. Co.*, 14 Neb., 550, it is said, in the opinion of Justice Maxwell, on page 559:

> "In our present constitution this section was amended by adding the words 'or damaged.' Under our former constitution if any portion of the real estate injured was appropriated, the law allowed full compensation for the injury, but if no part thereof was taken no damages could be recovered, however great the injury to the property. This

> being the state of the law at that time, what was the object of the amendment spoken of? In the case cited from Illinois, it was held that the words 'or damaged' were equivalent to the words 'injuriously affected' in the English statute, and we think that construction is correct. The constitutional provision, therefore, is that private property shall not be taken or injuriously affected without just compensation therefor. The evident object of the amendment was to afford relief in certain cases where, under our former constitution, none could be given. It was to grant relief in cases where there was no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate, by reason of which he sustains special injury in respect to such property in excess of that sustained by the public at large. * * * It is not necessary to entitle a party to recover, that there should be a direct physical injury to his property if he has sustained damages in respect to the property itself whereby its value has been permanently impaired and diminished. This is but justice."

The taking of private property does not necessarily mean the taking of real estate, but provisions of the various constitutions and acts of legislature and congress apply as well to the taking of personal property as of real property, and where, as in the case at bar, the railway company is not only required to part with the possession of certain portions of its real estate, but also with its money, for the purpose of constructing and operating a railroad on that real estate, the taking of the money is as much inhibited

by the constitution as would be the physical taking of a portion of its right-of-way, or its real estate.

Welton v. *Dickson*, 38 Nebr., 767;

C. B. & Q. Ry. Co. v. *State*, 50 Nebr., 399.

In the case of *Mich. Cen. R. R. Co.* v. *Collector*, 100 U. S., 595, it was held:

> "Taking property for public use is, *where the land or other property* of an individual is taken from him for the use of the government or public, and where, if the property were not paid for, the burden would fall chiefly upon the person whose property is taken and not upon the general public; in such case payment must be made, to prevent inequality."

In *Monongahela Nav. Co.* v. *U. S.*, 148 U. S., 324, it was held:

> "When Congress, under its power to regulate commerce, condemns and appropriates a lock and dam belonging to a navigation company on a navigable river, its action does not destroy the state franchise, and *just compensation requires payment for the franchise to take tolls as well as for the value of the tangible property.*"

In *Atlantic, etc., Tele. Co.* v. *Chicago, etc., R. R. Co.*, 6 Bisel, U. S., 158, it was held:

> "It is beyond the authority of Congress to deprive anyone of rights or property without providing compensation, and the telegraph company has no right to establish a line upon the right-

> of-way of a railroad without making compensation therefor in accordance with law."

As has been said, the proposed taking of the right-of-way and moneys of the defendant company is for a private and not a public use, and, as was held in *In re Manderson*, 51 Fed. Repr., 503, affirming *In re Montgomery*, 48 Fed. Repr., 896:

> "If the use for which it is proposed to take property is not a public use, no proceedings for condemnation can be allowed."

In the case of *C. B. & Q. R. R. Co.* v. *Chicago*, 166 U. S., 233-241, Mr. Justice Harlan, speaking for the court, said that:

> "It must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state—to its legislature, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the State 'violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.' This must be so, or, as we have often said, the constitution prohibition has no meaning, and 'the State has clothed one of its agents with power to annul or evade it.' *(Ex parte Virginia*, 100 U. S., 339, 346-347; *Neal v. Delaware*, 103 U. S., 370; *Yick Wo* v. *Hopkins*, 118 U. S., 356; *Gibson* v. *Mississippi*, 162 U. S., 565.) These principles were enforced in the recent case of *Scott* v. *McNeal*, 154 U. S., 34, in which it was held that the prohibitions of the Fourteenth Amendment

extended to 'all acts of the State, whether through its legislative, its executive or its judicial authorities'; and, consequently, it was held that a judgment of the highest court of a State, by which a purchaser at an administration sale, under an order of a Probate Court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law, contrary to the Fourteenth Amendment.

Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard — met the requirement of due process of law. *(United States* v. *Cruikshank,* 92 U. S., 542-544; *Leeper* v. *Texas,* 139 U. S., 462, 468.) But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must

be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law, which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is affected under the forms of State legislation.' *(Davidson* v. *New Orleans,* 96 U. S., 97-102.) The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law, as ordained by the Fourteenth Amendment, then the final judgment of a State court, under the authority of which the property is in fact taken, is to be deemed the act of the State, within the meaning of that amendment.

It is proper now to inquire whether the due process of law enjoined by the Fourteenth Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use, under the authority of a State.

In *Davidson* v. *New Orleans,* above cited, it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the Fourteenth Amendment. (See also *Missouri Pacific Railway* v. *Nebraska,* 164 U. S., 403, 417.) Such an enactment would not receive judicial sanction in any country having a

written constitution distributing the powers of government among three co-ordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated not as an exertion of legislative power, but as a sentence—an act of spoliation. Due protection of the rights of property has been regarded as a vital principle of republican institutions. 'Next in degree to the right of personal liberty,' Mr. Broom in his work on Constitutional Law says, 'is that of enjoying private property without undue interference or molestation.' (P. 228.) The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.' (2 Story Const., Sec. 1790; 1 Bl. Com., 138, 139; Cooley's Const. Lim., Sec. 559; *People* v. *Platt*, 17 Johns, 195, 215; *Bradshaw* v. *Rodgers*, 20 Johns, 103-106; *Petition of Mt. Washington Road Co.*, 35 N. H., 134, 142; *Parham* v. *The Justice, etc.*, 9 Georgia, 341, 348; *Martin et al., ex parte*, 13 Ark., 198, 206, *et seq.*; *Johnston* v. *Rankin*, 70 N. C., 550-555.)

But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law, as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applica-

ble to the direct appropriation by the State to public use, and without compensation, of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal, and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.

In *Fletcher* v. *Peck*, 6 Cranch, 87-135-136, this court, speaking by Chief Justice Marshall, said: 'It may be well doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted; but the question whether the act of transferring the property of an individual to the public be in the nature of legislative power is well worthy of serious consideration.

In *Loan Assn.* v. *Topeka*, 20 Wall., 655, 663, Mr. Justice Miller, delivering the judgment of

this court, after observing that there were private rights in every free government beyond the control of the State, and that a government, by whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was, after all, but a despotism, said: 'The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.' No court, he said, would hesitate to adjudge void any statute declaring that 'the homestead now owned by A should no longer be his, but should henceforth be the property of B.' In accordance with these principles, it was held in that case, that the property of the citizen could not be taken, under the power of taxation to promote private objects, and, therefore, that a statute authorizing a town to issue its bonds in aid of a manufacturing enterprise of individuals was void, because the object was a private, not a public, one. See also *Cole* v. *La Grange*, 113 U. S., 1.

In the early case of *Gardner* v. *Newburgh*, 2 Johns. Ch., 162, there being no provision in the constitution of the State of New York on the subject, Chancellor Kent said that it was a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice, that fair compensation be made to the owner of

private property taken for public use. In *Sinnickson* v. *Johnson*, 17 N. J. Law, 129, 145, it was held to be a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation was an incident to the exercise of the power of eminent domain; that the one was so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle, and that the legislature 'can no more take private property for public use without just compensation than if this restraining principle were incorporated into and made part of its State constitution.' These cases are referred to with approval in *Pumpelly* v. *Green Bay Co.*, 13 Wall., 166-178, and in *Monongahela Nav. Co.* v. *U. S.*, 148 U. S., 312, 325, this court saying in the latter case: 'And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that, when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.'

In *Searl* v. *School Dist.*, 133 U. S., 553, 562, and in *Sweet* v. *Rechel*, 159 U. S., 380-398, the court said that it was a condition precedent to the exercise of the power of eminent domain that the statute make provision for reasonable compensation to the owner.

In *Scott* v. *Toledo*, 36 Fed. Rep., 385-395-396, the late Mr. Justice Jackson, while circuit judge,

had occasion to consider this question. After full consideration that able judge said: 'Whatever may have been the power of the States on this subject prior to the adoption of the Fourteenth Amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the States cannot now lawfully appropriate private property for the public benefit, or to public uses, without compensation to the owner; and that any attempt to do so, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the State, and whether done directly, by taking the property of one person, and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that "due process of law" required by said amendment. The conclusion of the court on this question is that, since the adoption of the Fourteenth Amendment, compensation for private property taken for public uses constitutes an essential element in "due process of law," and that, without such compensation, the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution.' To the same effect are *Henderson* v. *Central Pass. Ry.*, 21 Fed. Rep., 358, and *Baker* v. *Village of Norwood*, 74 Fed. Rep., 997.

In *Mount Hope Cem.* v. *Boston*, 158 Mass., 509-519, in which the Fourteenth Amendment was invoked against a statute requiring the City of Boston to transfer certain cemetery property owned by it to a particular company, the court said: 'The conclusion to which we have come is that the cemetery falls within the class of property which the city owns in its private or proprietary character, as a private corporation might own it, and that its ownership is protected under the constitutions of Massachusetts and the United States, so that the legislature has no power to require its transfer without compensation,' citing the constitution of Massachusetts, Declaration of Rights, Article X, and the Fourteenth Amendment of the Constitution of the United States.

In his work on Constitutional Limitations, Mr. Cooley says: 'The principles, then, upon which the process is based are to determine whether it is "due process" or not, and not any consideration of mere form. * * * When the government, through its established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession; but when property is appropriated by the government to public uses, or the legislature interferes to give direction to its title through remedial statutes, different considerations from those

which regard the controveries between man and man must prevail, different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. * * * In every government there is inherent authority to appropriate the property of the citizen for the necessities of the State, and constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse. The restraints are that when specific property is taken, a pecuniary compensation, agreed upon or determined by judicial inquiry, must be paid.' (Pp. 356, 357.) In his discussion as to the meaning and scope of the Fourteenth Amendment, the same writer, in his edition of Story on the Constitution, after observing that every species of individual property was subject to be appropriated for the special needs of either the state or national government, but that the power to appropriate was subject to the restriction, among others, that it must not be exercised without making due compensation for whatever is taken, says: 'Due process of law requires, first, the legislative act authorizing the appropriation, pointing out how it may be made and how the compensation shall be assessed; and second, that the parties or officers proceeding to make the appropriation shall keep within the authority conferred, and observe every regulation which the act makes for the protection

> or in the interest of the property owner, except as he may see fit voluntarily to waive them.' (2 Story Const., Sec. 1956.)
>
> In our opinion, a judgment of a State court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."
>
> *C. B. & Q. Ry. Co.* v. *Drainage Com.*, 200 U. S., 593.

Is not the statute of Nebraska, as construed by the supreme court of that state, void, within the recent decision of this court in *L. & N. R. R. Co.* v. *Stock Yards*, 212 U. S., 132—in which the court said:

> "The law must save the rights of parties, and not leave them to the discretion of the courts as such.
>
> Where a general provision in the constitution of a state is void, as taking property without due process or compensation, and compensation has not been provided by statute, the defect cannot be cured by the courts inserting provisions for compensation in judgments under such constitutional provision.
>
> The duty of a carrier to accept goods tendered at its station does not require it to accept cars offered by competing roads at arbitrary points near its terminus for the purpose of

using its terminal station. A law requiring the carrier so to do is unconstitutional, as taking property without due process of law."

SECOND.

The Statute of Nebraska, the basis of this proceeding, according to its terms, and as construed by the Court, is arbitrary and unreasonable—denies to the Railroad Company the equal protection of the law; deprives it of its property, for private use, without compensation and without due process of law.

In the case of *Interstate Comm. Com.* v. *R. R. Co.*, 209 U. S., 118, it was said by this court that:

"Railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service, and equality between shippers and communities, *yet in no proper sense is the public a general manager.*"

And, subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, etc., have the right *"to manage their important interest upon the same principles which are regarded as sound and adopted in other trades and pursuits."*

It would seem unnecessary to present authorities to sustain such a self-evident proposition. Railroad companies, at common law, and under the State and Federal statutes, have imposed upon them many duties, and assume great responsibilities. Toward their passengers, they must exercise the highest degree of care and diligence. Their stations, depots and terminals must be so constructed, operated and maintained as will promote and secure the comfort, convenience and safety of the traveling public. It is a matter of common observation that, recognizing the danger of crossing tracks, especially in railroad yards, railroad companies construct their depots and freight houses in such a manner as to afford ingress to and egress from without crossing a railroad track. It would seem reasonable that these companies should have some discretion as to where a side track or switch should be constructed along, over or across their right-of-way or terminal grounds. The statute of Nebraska gives the company no discretion whatever in the premises. The applicant for a side track or switch may build his elevator on either side of the right-of-way, at any place, and *thereupon* it becomes the statutory duty of the railroad company, on demand of the applicant, "to erect, equip and maintain a side track or switch of suitable length to approach as near as four feet from the outer edge of their right-of-way, when necessary, etc."; and "any railroad company, officer or

agent thereof who willfully violates or evades any of the provisions of this act shall be liable to the party injured for all damages sustained by reason of such violation, and, in addition thereto, shall be liable for each offense to a penalty of five hundred dollars, etc." The convenience and safety of the traveling public, as well as the business interest of the railroad company, by this state, are arbitrarily, subordinated to the *desire* of the applicant for a side track or switch. The railroad company has absolutely no voice in the matter. It can appeal to no tribunal for relief. But it may be said that it has permitted another elevator to be located on its right-of-way. Does that fact give to every person who wants an elevator site the right to demand it of the railway company? The tracks and terminals of the railway company may be so laid out, constructed and operated as to render it impracticable to give up any more of its station grounds, and equally impracticable to "erect, equip and maintain" the side track or switch demanded. But who is to determine these controverted questions? The statute contemplates and does vest in the applicant the power to be the *sole* judge.

Nor. Pac. R. R. v. *Dustin*, 142 U. S., 492;

R. R. Co. v. *Minn.*, 193 U. S. 53.

The State court held (see in No. 356, p. 73) that: "In consideration of the franchise that they receive from the State, railroad companies agree to perform certain duties toward the public, *and the power of determining those duties*, and enforcing their performance, is vested in the courts." The State court treats the whole question as a *public* duty, and not from the

standpoint of enforcing a private right *(C., B. & Q. R. R. Co.* v. *Chicago,* 166 U. S., 333-341); and places the management of railroad property in the hands of the court.

In the case of *Atlantic Coast Line* v. *N. C. Com.*, 206 U. S., 20, it was said that:

> "As the public power to regulate railways and the private right of ownership of such property co-exist, and do not the one destroy the other, it has been settled that the right of ownership of railroad property, like other property rights, finds protection in constitutional guarantees, and, therefore, wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect, not a regulation, but an infringement upon the right of ownership, such an exertion of power is void, because repugnant to the due process and equal protection clause of the Fourteenth Amendment."

The statute of Nebraska does not contemplate "regulation," but absolute control.

> "This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and un compensated taking or destruction of any private property, legally acquired and legally held."

Reagan v. *Farmers, etc., Co.*, 154 U. S., 399.

In the *Railroad Commission Cases*, 116 U. S., 331, it was said that:

> "The power to regulate is not the power to destroy, and limitation is not the equivalent of confiscation."

If the legislature can, under the guise of regulation, require railroad companies to construct and equip side tracks or switches, when demanded, to elevators, why may it not provide for a side track or switch for every farmer who owns land abutting the right-of-way to his corn crib?

In the case of *Connally* v. *Union Sewer Pipe Co.*, 184 U. S., 540, it was said that:

> "No right granted or secured by the Constitution of the United States can be impaired or destroyed by a State enactment, whatever may be the source from which the power to pass such enactment may have been derived. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The State has undoubtedly the power, by appropriate legislation, to protect the public morals, public health and the public safety, but if, by their necessary operation, its regulations looking to either of these ends amounts to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Every person in Nebraska, except a railway company, may exercise some discretion in the manage-

ment of his business. Under this statute, the railway company has no discretion. But has not this court settled this question in *Hartford Ins. Co.* v. *Chicago Ry.*, 175 U. S., ..., in which it was said, approving *Ry. Co.* v. *Nebraska*, 164 U. S., 403, that:

> "A railroad corporation holds its station grounds, railroad tracks and right-of-way for the public use for which it is incorporated, *yet as its private property*, and to be occupied by itself, or by others, *in the manner which it may consider best fitted to promote, or not interfere with, the public use.* It may, *in its discretion*, permit them to be occupied by others, with structures convenient for the receiving and delivering of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers. *(R. R. Co.* v. *Richardson*, 91 U. S., 454.) And it must provide reasonable means and facilities for receiving goods offered by the public to be transported over its road. *(Stock Yards* v. *Keith*, 139 U. S., 128.) *But it is not obliged, and cannot even be compelled, by statute, against its will, to permit private persons or partnerships to erect and maintain elevators, warehouses or similar structures, for their own benefit, upon the land of the railroad company. (Mo. Pac. Ry. Co.* v. *Neb., 164 U. S., 403.)"*

The Manley Co-operative Grain Company is a private corporation, and its elevator is operated for the benefit of its members, the same as any other private business. In the case of *Dodge* v. *Mission Twp., etc.*, 107 Fed. Repr., 827, it was said that:

> "It is a fundamental principle of a republican

> form of government that no man shall be involuntarily deprived of life, liberty or property without due process of law. The prohibition of such a deprivation by the States is found in the Fourteenth Amendment to the Constitution of the United States. But it lies deeper and limits and conditions every grant of legislative, executive or judicial authority. * * * A legislative act which takes, or undertakes to authorize the taking of private property for a *private* object, either by taxation or by the exercise of the power of eminent domain, or *by any other means*, is not a law, but an arbitrary decree, whereby the property of one citizen may be transferred to another. Such an act is beyond the limits of the powers granted by the people to the legislatures of the States, and is without legal force or effect. * * * A legislature cannot make a private purpose a public one by its mere fiat, and the determination of the question in any case whether or not a given object is public or private is a judicial, and is not a legislative, function."

Loan Assn. v. *Topeka*, 20 Wall., 655, is a case which necessarily leads to the conclusion that every statute which takes property from one person, and confers it upon another, without compensation, is unconstitutional and void.

In *McKinster* v. *Sager*, 163 Ind., 671, the court said:

> "The effect of the guaranty of due process of law, and of the equal protection of the laws, is to prevent the State from exercising, by any of its departments, arbitrary and capricious power over persons or property."

This statute of Nebraska is an *arbitrary* and *capricous* exercise of power, which is obnoxious to the constitutional provision which secures to all persons *"the equal protection of the laws."*

Again, we submit that the effect and practical operation of the statute is to enable the owner of the elevator to exercise the right and power of eminent domain, and secure for his private use, without compensation, a completely constructed and equipped side track or switch across the land and right-of-way of the railway company, which is already impressed with and devoted to a public use. Assuming that the legislature has the right to confer upon an individual the right to exercise the power of eminent domain, just compensation to be ascertained by an impartial tribunal is a constitutional right of the owner of the property taken under the power of eminent domain.

But it seems to be well settled that the doctrine of eminent domain is that private property may be appropriated to *public* use upon compensation being made; but it cannot be taken for private purposes without the consent of the owner, whether compensation is made or not. The assertion of a right on the part of the legislature to take the property of one citizen, and transfer it to another, even for a full compensation, where the public interest is not promoted thereby, is claiming a despotic power, and one inconsistent with every just principle and fundamental maxim of a free government.

In re Eureka Warehouse, 96 N. Y., 42-48, it was said that:

> "The fact that the use to which the property is intended to be put, or the structure intended

> to be built thereon, will tend incidentally to benefit the public by affording additional accommodations for business, commerce or manufacture, is not enough to bring the case within the operation of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use or to direct their management is conferred upon the public."

Weidenfeld v. *Sugar, etc., Co.*, 48 Fed. Repr., 615-618;

Gaylord v. *Chicago, etc.*, 204 Ill., 576.

Jordan v. *Woodward*, 40 Me., 317.

Not only must the purpose for which the land is taken be one in which the public has an interest, but the State must have a voice in the manner in which the public may avail itself of that use.

Board of Health v. *Van Hoesen*, 87 Mich., 533;

In re Burns, 155 N. Y., 23-49;

Wisconsin Keely Co. v. *Milwaukee, etc.*, 95 Wisc., 153;

Davidson v. *New Orleans*, 96 U. S., 97-102;

Loan Assn. v. *Topeka*, 20 Wall., 655.

It will be observed that the statute does not provide for any use to which the side track or switch so constructed shall be put, other than "for the purpose of loading grain into cars from said elevator, and for

handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, etc." It clearly contemplates an exclusive use by and for the benefit of the "persons and associations" operating the elevator.

In operation and effect the statute is a delegation of the right and power of eminent domain for a private purpose, *and, without notice or hearing,* permits and authorizes any "person or association" to take and appropriate the private property of the railroad company, without its consent, and without compensation.

BALIE P. WAGGENER,

JAMES W. ORR,

Attorneys for Plaintiff in Error.

AUG 20 1909
JAMES H. McKENNE

In the Supreme Court of the United States

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
v.
THE STATE OF NEBRASKA, EX REL. THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA,
Defendant in Error.

No. [redacted]128

BRIEF OF PLAINTIFF IN ERROR.

BALIE P. WAGGENER,
JAMES W. ORR,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE STATE OF NEBRASKA,
Defendant in Error.

No. 345.

STATEMENT.

The Manley Co-operative Grain Company of Manley, Nebraska, is a private corporation duly organized and chartered under the laws of Nebraska. On the 23d day of October, 1905, it caused to be served upon the railway company a notice or demand—a copy of which is as follows, to-wit (Abst., p. 65):

"The Manley Co-operative Grain Association.
C. M. Andrus, Mgr.

Manley, Nebr., Oct. 23d, 1905.

To the Officers of the Missouri Pacific Railroad Co.

Gentlemen: The members of this association hereby make application for a lease to ground on the right-of-way of the Missouri Pacific R. R. in Manley, Neb., the ground to be used as a building site for a grain elevator.

An early reply will be appreciated.
THE MANLEY CO-OPERATIVE GRAIN ASSOCIATION,
By J. B. Cleghorn, Secretary.
Manley, Nebr."

And, such request not having been complied with on the 8th day of November, 1905, a demand was served upon the company for the construction of a side track from the main line of the defendant company, across its right-of-way, to an elevator alleged to have been constructed by the said co-operative association. This demand not having been complied with, on the 17th day of May, 1906, there was filed in the District Court of Cass County, Nebraska, a petition or complaint—which is in words and figures as follows (Abst., pp. 1-2):

"The State of Nebraska, Plaintiff, vs. The Missouri Pacific Railway Company, Defendant.

The plaintiff complains and alleges:

First. That the defendant, the Missouri Pacific Railway Company, is a corporation duly organized and authorized to do business in the State of Nebraska; that said defendant has constructed and now operates lines of railroad in Cass County, Nebraska, and has so operated such lines of railroad for a number of years last past; that defendant has established stations along said line of railroad, and established and for a number of years has maintained, and now maintains, a station, depot and side tracks at the village of Manley, in Cass County, Nebraska, and at such station receives from the public, for ship-

ment, grain, merchandise and stock, and there transacts a general freight business.

Second. That the Manley Co-operative Grain Association of Manley, Nebraska, is a corporation duly organized and authorized to transact business in Cass County, in the State of Nebraska, and is authorized to buy, sell and ship grain, buy, construct and lease elevators for the storage and shipment of grain of all kinds, and secure real estate for the location thereof; that said Manley Co-operative Grain Association is now in the active business of buying, selling and shipping grain over the road of defendant railway company.

Third. That the said Manley Co-operative Grain Association of Manley, Nebraska, requested of said defendant a site on the right-of-way of defendant on which to build an elevator for receiving and shipping grain, which request was denied; whereupon said The Manley Co-operative Grain Association secured the control of land adjacent to the right-of-way of defendant at Manley, Nebraska, constructed an elevator thereon with a capacity of not less than fifteen thousand bushels of grain, and on the 9th day of February, A. D. 1906, notified said railway company, defendant herein, that said The Co-operative Grain Association had completed its elevator and was ready to receive grain and ship it from said elevator, and requested defendant to erect, equip and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of defendant's right-of-way where the said Manley Co-operative Grain Association had constructed its said elevator, so said association could load cars from said elevator, and ship the same over the road of defendant.

Fourth. That more than sixty days have elapsed since the serving of said notice and request,

and the said defendant railway company neglected and refused, and still neglects and refuses, to erect, equip and maintain a side track or switch to the said elevator of The Manley Co-operative Grain Association of suitable length to approach as near as four feet of the outer edge of defendant's right-of-way against the form of the statutes in such case made and provided.

Fifth. That hereby the defendant became indebted to the plaintiff in the sum of five hundred dollars, whereby an action accrued to the plaintiff according to the provisions of Sections one (1) and one e (1e) of Chapter 72, Art. 5, Compiled Statutes of Nebraska for 1905.

Wherefore plaintiff demands judgment against the defendant in the sum of five hundred dollars, with costs of action.

THE STATE OF NEBRASKA,
By C. A. Rawls, County Attorney."

And thereafter the defendant railway duly filed its answer (Abst., pp. 4-8), and, issue being joined thereon, the matters and things in controversy were tried before the court without a jury. Thereafter, on the 20th day of December, 1906, the following decree and judgment was entered against the railway company, viz. (Abst., p. 10):

"DECREE.

And now on the 20th day of December, A. D. 1906, it being one of the days of the regular September, A. D. 1906, term of this court, this cause came on for decision, the court having

taken said cause under advisement, and the court being fully and well advised in the premises, and in consideration of the evidence and argument of counsel, the court finds the issues in favor of the plaintiff, and the court finds the defendant guilty as charged in the complaint.

It is therefore considered, ordered and adjudged that plaintiff have and recover from the defendant the sum of $500.00, together with costs of this action, taxed at $———.

To all of which defendant excepts, and forty days from the rising of the court is given to prepare and serve bill of exceptions."

An appeal was taken from this judgment and decree to the Supreme Court of Nebraska, and thereafter the said decree and judgment of the District Court was affirmed by the Supreme Court of Nebraska, as follows (Abst., p. 72):

"This cause coming on to be heard, upon appeal from the District Court of Cass County, was argued by counsel, and submitted to the court; upon due consideration whereof the court doth find no error apparent in the record of the proceedings and judgment of the said District Court. It is therefore considered, ordered and adjudged that the said judgment of the District Court be and the same is hereby affirmed; that appellee pay all costs incurred by it, taxed at $———, and have and recover of and from the appellant all its costs so expended herein; that appellant pay all costs incurred herein by it, taxed at $———, for all of which execution is hereby awarded, and that a mandate issue accordingly."

Proceedings in error were instituted in this court to review the judgment and decision of the Supreme Court of Nebraska.

ASSIGNMENT OF ERRORS.

First.

The Supreme Court of Nebraska erred in deciding and affirming the judgment of the court below; that the state courts of Nebraska have jurisdiction of the subject matter of the action commenced in the court below, and so decided in the said Supreme Court, and has authority to hear, try and determine the issues thereof, and thereby holding and determining that the legislature of the State of Nebraska had authority to govern and control the instrumentalities of an interstate railroad, including its switches, spurs, side tracks and elevators.

Second.

The Supreme Court of Nebraska erred in holding and deciding that, notwithstanding the Congress has legislated upon the precise subject, and afforded a complete remedy, and designated the tribunal where a remedy may be afforded, the state legislature likewise has authority to legislate upon the same subject, and to compel the construction of a switch track, upon the

application of a shipper, rendering interstate as well as intra-state traffic, and also holding that the fine imposed upon the appellant company for its refusal to construct such switch was done in the rightful exercise of constitutional authority.

Third.

The Supreme Court of Nebraska erred in deciding that the subject matter of said suit was not governed by the provisions of the act of Congress to regulate commerce, and of the acts amendatory and supplemental thereto.

Fourth.

The Supreme Court of Nebraska erred in deciding, contrary to Section 8 of Article 1 of the Constitution of the United States, and contrary to the acts of Congress to regulate commerce, and the amendments thereto, that the appellant company was under legal obligations to construct, operate and maintain a switch track from its line at Manley, Nebraska, to the elevator of the Manley Co-operative Grain Association, and that its failure so to do would subject it to the penalties fixed by the act of the Nebraska legislature passed in relation thereto.

Fifth.

The Supreme Court of Nebraska erred in deciding that the appellant company was under legal obligations to construct, operate and maintain a switch track from its line of railroad at Manley, Nebraska, to connect with the elevator of the Manley Grain Association at said place, for the purpose of transporting grain from such elevator, at least fifty per cent of which was to be transported to points beyond the State of Nebraska, and being in its nature interstate commerce.

Sixth.

The Supreme Court of Nebraska erred in deciding

that Chapter 105 of the Session Laws of 1905 of Nebraska was not repugnant to, nor in contravention of, nor in conflict with Section 8 of Article 1 of the Constitution of the United States and of the acts of Congress to regulate commerce, and of the amendments thereto, when applied to the instrumentalities of an interstate carrier, as such is defined by the act to regulate commerce as amended, and the acts supplementary thereto, approved June 30th, 1906.

Seventh.

The Supreme Court of Nebraska erred in holding and deciding that the said Chapter 105 of the Laws of 1905 of Nebraska, and the enforcement of the provisions thereof, is not objectionable as allowing the taking or damaging of private property of the appellant company without just compensation to it, nor as depriving a citizen of its property without due process of law, and further, that said chapter, in this regard, is not violative of, nor repugnant to, the provisions of the fourteenth article of amendment to the Constitution of the United States.

Eighth.

The Supreme Court of Nebraska erred in holding and deciding that said Chapter 105 of the Laws of 1905 of Nebraska, which requires the appellant company, without compensation, to surrender a portion of its right-of-way, and, at its own expense, construct, maintain and operate a switch track for the private use of the Manley Co-operative Grain Association at Manley, Nebraska, is not repugnant to or in violation of Section 21 of the Bill of Rights of Nebraska, which provides:

> "The property of no person shall be taken or damaged for public use without just compensation therefor."

Ninth.

The Supreme Court of Nebraska erred in deciding

tified copy of the within application to James B. Varner, agent of the Missouri Pacific Railway Company in Falls City, Nebraska. All done in Falls City, Richardson County, Nebraska, on the 2d day of August, 1906.

J. E. MCFARLAND, *Constable.*"

The railway company filed its plea in abatement, in words as follows, viz. (Abst., pp. 7-8):

"In the District Court of Richardson County, State of Nebraska. The Farmers' Elevator Company, of Strausville, Nebraska, Relator, v. The Missouri Pacific Railway Company, Respondent.

Plea in Abatement of the Respondent to the Jurisdiction of the Court.

Now comes the above named respondent, The Missouri Pacific Railway Company, and presents this, its plea in abatement to the jurisdiction of the court to hear, try and determine the subject matter of the alternative writ of mandamus issued herein, and thereon alleges and charges the facts to be:

First.

That the said respondent, The Missouri Pacific Railway Company, is a railroad corporation, organized and incorporated under the laws of the State of Missouri, and owns and operates a line of railway from the City of St. Louis, in the State of Missouri, westwardly through the States of Kansas and Nebraska, to the City of Omaha, in said State of Nebraska; that it is an interstate carrier, engaged as aforesaid in the transportation of commerce

between the said several States mentioned and the Indian Territory, and has been so engaged in the operation of its railroad, as such common carrier, for many years last past, and as such amenable to the Act of Congress of the United States known as the Interstate Commerce Act, and the amendments thereto, which went into effect on the 28th day of August, 1906.

Second.

Respondent further says that this court has no jurisdiction of the subject matter of this controversy, or of the matters and things set forth in the alternative writ of mandamus; and thereon alleges and charges the fact to be that this respondent is an interstate carrier, and, as hereinbefore alleged, amenable to a special tribunal created by the Congress of the United States, and known as the Interstate Commerce Commission. That said plaintiff, although incorporated under the laws of the State of Nebraska, is engaged in an interstate business, and the said track, spur and switch which it has demanded of and from said respondent is to be used, and intended to be used, for the purpose of transporting grain from its elevator to other points than in the State of Nebraska, and the transportation of which grain comes under the jurisdiction and supervision of the Interstate Commerce Commission, and the neglect and refusal of said Missouri Pacific Railway Company, respondent herein, to provide said track, spur and switch as demanded by said plaintiff, can only be controlled and supervised by the Interstate Commerce Commission, and not by the courts of the State of Nebraska.

Third.

Respondent further says that said plaintiff has a full and adequate remedy provided by the Interstate Commerce Act, and the Amended Interstate Commerce Act, and that the Interstate Commerce Commission has full power, authority and exclusive jurisdiction in the premises, and that this court has no right, power, authority or jurisdiction to grant to the said plaintiff any relief in the premises.

Wherefore respondent prays that said proceedings so instituted by said plaintiff herein may be abated, and that this court shall hold and determine that it does not have jurisdiction of the subject matter of the controversy; and that said application for a writ of mandamus shall be dismissed, and this defendant required to no further answer or appear therein, and that said defendant have judgment for costs.

ISHAM REAVIS,
JAMES W. ORR,
B. P. WAGGENER,
Attorneys for Defendant.

State of Kansas, Atchison County, ss:

B. P. Waggener, being first duly sworn, deposes and says that he is the duly authorized general attorney of the defendant above named, The Missouri Pacific Railway Company, a corporation; that he has read and knows the contents of the within and foregoing plea of abatement, and that the matters and things therein stated are true, as he verily believes.

B. P. WAGGENER.

Subscribed and sworn to before me this 22nd day of September, 1906.

NETTIE R. CLUTE,
Notary Public.

My commission expires Feb. 3, 1909.
(Seal.)"

To which the elevator company demurred, as follows (Abst., p. 9):

"Demurrer of said Relator and Plaintiff.

1st. Now comes the said relator, plaintiffs in the above entitled cause, and demurs to the answer of said plaintiff, for the following reasons:

2nd. Because the plea in abatement filed by the defendant respondent in this action does not state facts sufficient to constitute a cause of action.

3rd. Because the plea in abatement filed by said respondent defendant, as its answer and defense in this action, does not state facts sufficient to constitute any defense whatever in this action.

4th. Because the said answer of said respondent defendant in this action filed called a plea of abatement, does not state facts sufficient to constitute a cause of action, or any defense whatever to this action.

5th. Because the said answer of said respondent defendant filed in this action, as defense to relator plaintiff's petition, does not state facts sufficient to constitute any defense whatsoever to said plaintiff's petition; nor does it state facts sufficient to constitute any cause of action or defense to said relator plaintiff's petition whatsoever.

6th. Because said answer of defendant, and all its allegations therein in this action, is wholly insufficient to constitute any defense whatever to said relator plaintiff's petition.

7th. The said relator plaintiffs here demur to the plea of abatement and answer of respondent defendant filed as an answer to said plaintiff's petition.

R. C. JAMES AND
G. GILLESPIE,
Attorneys for Relator Plaintiffs."

And thereafter withdrew its demurrer (Abst., p. 10), and the cause was set down for hearing "on that part of the plea objecting to the jurisdiction of the court over the subject matter of said action of relator"; and thereon the court made the following order (Abst., p. 10), to-wit:

"Now on this October 25th, 1906, this cause came on further to be heard on application of relator and the plea in abatement of respondent, on the ground that this court is without jurisdiction of the subject matter of said action. The court having heard argument of counsel for the respective parties, and, being fully advised in the premises, it is ordered and adjudged that the objections of respondent to the jurisdiction of this court over the subject matter of relator's action be, and the same are hereby, overruled. To which ruling the respondent excepted."

Thereupon the railway company filed its answer. (Abst., pp. 10-15.)

On the trial it was conceded, or at least shown without dispute, that the railway company was an in-

terstate carrier, incorporated under the laws of the State of Missouri, and operating a line of railway through the States of Nebraska, Kansas, Missouri, Arkansas, Louisiana, Texas and Colorado, and engaged in an interstate carrying trade of freight and passengers. (Abst., pp. 38-39.) The evidence on behalf of the elevator company is all set forth in the abstract (Abst., pp. 21-38), and it is conceded (Abst., p. 26) that the grain from the elevator was shipped to Atchison, Kansas, St. Louis and Kansas City, Missouri, and there is no evidence that any of it was shipped, or intended to be shipped, to Nebraska points. It is also conceded (Abst., p. 40) that the length of the switch or spur demanded by the elevator company would be 960 feet, and the cost would be $1732.00. (Abst., p. 40.)

The following extract from the evidence of the principal officer of the company will be instructive: (Abst., pp. 25-30.)

"Q. When did you say you commenced the office of secretary of this company and treasurer?
A. When the company was incorporated.

Q. In about 1904 some time?
A. No, sir; I didn't state that.

Q. When was it?
A. I said I was manager about the first of May, 1905.

Q. From that time up until when?
A. Until about the first of September.

Q. This year?
A. Yes, sir.

Q. As manager, what were your duties?
A. Buying and selling grain.

Q. Who composed the membership of this Farmers' Grain Elevator Company?
A. Thirty-one of us farmers in the neighborhood of Strausville.

Q. Do all these farmers bring their grain to this elevator?
A. Principally so; unless they sell to feeders.

Q. If they have to elevate, they bring it to your elevator?
A. Yes, sir.

Q. Unless they sell it locally, they bring it there, and put it in the elevator to sell—is that right?
A. Yes; they don't bring it and put it in the elevator to sell. I buy it outright.

Q. You buy it outright?
A. Yes, sir.

Q. Your patrons are members of the corporation?
A. Yes, and a lot besides.

Q. Where do you ship this grain to?
A. We sell lots of it there on the track; some we consign and some we sell.

Q. My question is, where do you ship to—where do you send it to?
A. We ship south.

Q. Where to?
A. To Atchison some, and St. Louis and Kansas City some.

Q. Atchison, Kansas; St. Louis and Kansas City, Missouri, isn't it?
A. Yes, sir.

Q. Did you have the exclusive management of that elevator from the time you began until you quit?

A. There was a board of directors or trustees.

Q. Who composed the board of directors or trustees?

A. Part of the company; part of the stockholders.

Q. Where was this elevator erected in reference to the right-of-way of the defendant company, do you know?

A. I don't understand your question.

Q. Question read.

A. What do you mean by the question?

Q. Is it north or south or east or west of the railroad?

A. It is south.

Q. It is south of the railroad?

A. That is, the railroad angles a little; it is on the south side.

Q. The railroad runs in a northwest and southeast direction there?

A. Yes, sir.

Q. It is on the southwest side of the railway?

A. Yes, sir.

Q. Is there a public highway crossing the dump at that point, or near that point?

A. There is a public road crosses the track there. Yes sir.

Q. Where in reference to your elevator?

A. We are on the east side of the public road.

Q. You are on the east side of the public road?

A. Yes, sir.

Q. Are there any other elevators at that point?

A. Yes, sir.

Q. Where are they?
A. That is, west of the public road.

Q. How far west of the public road?
A. I should judge about thirty rods, maybe less.

Q. Where is the depot, in reference to the public road?
A. It is close to the other elevator, that is the site—there is no depot there.

Q. That makes it west of the public road?
A. Yes, sir.

Q. Is there a spur or switch track there?
A. Yes, sir.

Q. Where does that spur track or switch track commence and end, in reference to the public road, east or west of it?
A. West of it.

Q. It is all located west of the public road?
A. Yes, sir.

Q. Your elevator is east of the public road?
A. Yes, sir.

Q. What is the general character of the ground there, in reference to being level, up grade or down grade, from the switch to your elevator?
A. It is apparently level—maybe a little lower west.

Q. And raises from the track toward your elevator?
A. I guess I got that wrong; the cars run east this way, so it is lowest this way.

Q. Then it would be down grade from the switch?
A. To the elevator.

Q. How far west of the west side of the public road is the east end of the switch?
A. I should judge it was 100 feet; maybe not so much.

Q. How far east of the east side of that road is your elevator?
A. I should judge about 100 feet.

Q. Do you know where the railroad right-of-way line is there between the tracks and your elevator?
A. I think I do.

Q. How far is it from your elevator?
A. About a foot or fifteen inches.

Q. That is the southwestern line?
A. Yes, sir.

Q. How many elevators are there now?
A. Now.

Q. Do you know the capacity of that elevator?
A. I don't.

Q. Is it as large as yours?
A. I think not.

Q. Do you know?
A. I don't.

Q. Give your best opinion as to the relative capacity of the two elevators?
A. I think I heard the other fellows say about 10,000 bushels.

Q. How much of a town is Strausville?
A. It has only three or four houses.

Q. Any stores?
A. Yes, sir.

Q. How many?
A. One.

Q. General store?
A. Yes, sir.

Q. Has it any post offices?
A. Yes, sir.

Q. What other business is done there?
A. There is a blacksmith shop.

Q. Church?
A. No.

Q. Schools?
A. No, sir.

Q. Any depot there? Does the Missouri Pacific have a depot there?
A. No, sir.

Q. Station?
A. A station; you can get off and on there.

Q. Cars stop there?
A. Yes, sir.

Q. Has it a depot building?
A. No, sir.

Q. What is your closest town southeast of there?
A. Falls City.

Q. What is the size of Falls City, in a general way?
A. I think the papers give about 5,000.

Q. Any elevators at Falls City?
A. Yes, sir.

Q. How many?
A. Two.

Q. Any more than two?
A. I think that is all.

Q. On what road are they?
A. One on the Missouri Pacific and one on the B. & M.

Q. Two railroads run into Falls City?
A. Yes, sir.

Q. What is your nearest station in a northwest direction?

A. Verdon.
Q. How large a place is Verdon?

A. I am sure I could not say; probably 1,000 or 1,500.

Q. How far is it from Strausville?
A. I judge about five miles, or six.

Q. Is it as far as that?
A. About that.

Q. How many railroads go to Verdon?
A. Two.

Q. Burlington and Missouri Pacific?
A. Yes, sir.

Q. How many elevators have they there?
A. Two.

Q. One on each line?
A. Yes, sir.

Q. All kinds of business done at Verdon?
A. I think so.

Q. It has school houses and churches and business houses?
A. Yes, sir.

Q. What is your nearest town in any other direction than those you named?
A. Salem is southwest.

Q. How far?
A. Seven or seven and a half.

Q. On what line of road?
A. B. & M.

Q. How many elevators?
A. Two, I think.

Q. How large a place is Salem?
A. Not quite as large as Verdon, or the same size.

Q. In the neighborhood of 1,000 inhabitants?
A. Yes, sir; I judge so.

Q. The town of Salem has several stores?
A. Yes, sir.

Q. And does a general trading business?
A. I think so.
Q. Has churches and schools?
A. Yes, sir.
Q. What other town, in the opposite direction, do you have; what is the nearest town?
A. We have Shubert, north about ten miles.
Q. What line of road is that on?
A. On the B. & M.
Q. Has that any elevators?
A. I think so.
Q. How large a town is Shubert?
A. I don't know; it has been a long time since I have been there.
Q. Have you any town northeast?
A. No railroad town.

Q. How is Dawson—how far from your place?
A. It must be ten or twelve miles.

Q. What sized town is Dawson, about?
A. It is a little smaller than Verdon, I should judge.

Q. How many railroads are there?
A. One.

Q. Does it do a general business?
A. I think so.

Q. Do you know how many elevators they have there?
A. I don't.

Q. It has a number of stores?
A. I think so.

Q. Schools and churches?
A. Yes, sir.

Q. Are there any other towns within a radius of ten miles of Strausville that you have not mentioned?
A. I think not; no railroad towns.

Q. Any towns at which there are grain elevators?
A. No, sir."

The court made the following order allowing the peremptory writ, viz: (Abst., pp. 15-16).

"This cause came on for hearing upon the amended application for writ of mandamus and the answer thereto, and the evidence was submitted to the court, on consideration whereof the court finds all the issues in favor of the relator. The court finds that the elevator in controversy was built adjacent to the right-of-way of the respondent company's railroad at Strausville, in Richardson County, Nebraska, and was completed and in operation prior to the first day of April, A. D. 1905, and that said elevator has a capacity of 15,000 bushels or more. The court further finds that, on the 31st day of May, 1906, an application was made in writing by the relator to the respondent for a site for the construction of an elevator on respondent's railroad right-of-way at the said station of Strausville, and that, after a period of more than sixty days had passed, the respondent company had wholly failed, refused and neglected to grant the site as requested; that on the 2d day of August, 1906, the relator requested the respondent in writing to build a side track connecting relator's elevator at the said station of Strausville with respondent's railroad, and that said request has been wholly disregarded.

It is therefore considered by the court that a peremptory writ of mandamus issue against the

> said Missouri Pacific Railway Company, a corporation, respondent in this said cause, commanding it forthwith to erect, equip, and maintain a proper switch or side track leading from the respondent's main line of railroad to the said relator's elevator, which is situate adjacent to the right-of-way of said respondent's railroad at the station of Strausville, in Richardson County, Nebraska—which switch or side track shall be of suitable length to approach as near as necessary the said relator's elevator at the said station of Strausville, as to enable the said relator company to load grain directly from its said elevator into respondent's cars on said switch or side track."

An appeal was taken by the Railway Company to the supreme court of the state from the order and judgment of the district court, and that judgment was affirmed (Abst., pp. 71-74), and the case is in this court on writ of error to the supreme court of the state, to review the decision and judgment of that court.

ASSIGNMENT OF ERRORS.

First.

The supreme court of Nebraska erred in deciding and affirming the judgment of the court below, that the state courts of Nebraska have jurisdiction of the subject-matter of the action commenced in the court below, and so decided in the said supreme court, and that said state courts have authority to hear, try and determine the issues thereof, thereby holding and determining that the legislature of the state of Nebraska had authority to enact laws for the government and control of the instrumentalities of an interstate railroad, including its switches, spurs, side tracks and elevators.

Second.

The supreme court of Nebraska erred in holding and deciding that, notwithstanding the Congress has legislated upon the precise subject, and afforded a complete remedy, and designated the tribunal where such remedy may be afforded and invoked, the legislature likewise has authority to legislate upon the same subject, and to compel the appellant to construct a switch track upon its right-of-way, on the application of a shipper, tendering interstate traffic, and also in holding and deciding that the writ of mandamus allowed and ordered by the court below commanding the appellant company to construct, maintain and operate such switch, was done in the rightful exercise of constitutional authority.

Third.

The supreme court of the state of Nebraska erred in deciding that the subject-matter of said suit was not governed by the provisions of the act of Congress to regulate commerce, and of the acts amendatory and supplemental thereto.

Fourth.

The supreme court of Nebraska erred in deciding and holding, contrary to Section 8 of Article 1 of the Constitution of the United States, and in opposition and repugnant to the acts of Congress to regulate commerce, and of the acts amendatory and supplemental thereto, that the appellant company was under legal obligations to construct, operate and maintain a switch track from its line at Strausville, Nebraska, to the elevator of the Farmers' Elevator Company, of Strausville, and that its failure and refusal so to do was properly and legally required by the writ of mandamus granted and allowed by the court below.

Fifth.

The supreme court of Nebraska erred in deciding that the appellant company was under legal obligation to construct, operate and maintain a switch track from its line of railroad at Strausville, Nebraska, to connect with the Farmers' Elevator Company, of Strausville, at said place, for the purpose of transporting grain from such elevator to points beyond the state of Nebraska, and being in its nature interstate commerce.

Sixth.

The supreme court of the state of Nebraska erred in deciding that Chapter 105 of the Session Laws of 1905, of Nebraska, was not repugnant to, nor in contravention of, nor in conflict with Section 8 of Article I of the Constitution of the United States, and of the acts of Congress to regulate commerce, and of the amendments thereto, when applied to the instrumentalities of an interstate carrier, as such is defined by said act to regulate commerce, as amended, and the acts supplementary thereto, approved June 30th, 1906.

Seventh.

The supreme court of Nebraska erred in holding and deciding that said Chapter 105 of the Laws of 1905, of Nebraska, and the enforcement of the provisions thereof, is not objectionable as allowing the taking or damaging of private property of appellant company, without just compensation to it, nor depriving a citizen of its property without due process of law, and further that said chapter, in any such regard, is not violative of, nor repugnant to, the provisions of the Fourteenth Article of Amendment to the Constitution of the United States.

Eighth.

The supreme court of Nebraska erred in holding and deciding that Section 1, Chapter 105, of the Laws of 1905, of Nebraska, is not subject to the objection of being special legislation or allowing the taking of private property without just compensation, or of depriving the citizen of his property without due process of law.

Ninth.

The supreme court of Nebraska erred in deciding, under the facts and circumstances in the case:

"That, in consideration of the franchise that they receive from the state, railroad companies agree to perform certain duties toward the public, and that the power of determining those duties, and enforcing their performance, is vested in the courts of the state."

Tenth.

The supreme court of the state of Nebraska erred in deciding:

"That to deny the state the power to require the erection of depots, or construction of side tracks, and such other facilities as the public necessities require, would enable railway companies to create a monopoly in the handling of the products of the company adjacent to their lines, and to turn it over to whomsoever they chose."

Eleventh.

The supreme court of Nebraska erred in deciding and holding that Chapter 105 of the Laws of 1905, of Nebraska, which require the appellant company, without compensation, to surrender a portion of its right-of-way, and, at its own expense, to construct, maintain and operate a switch track for the private use of the Farmers' Elevator Company, of Strausville, Nebraska, is not repugnant to or in violation of Section 21 of Article I of the Bill of Rights of Nebraska, which provides:

"The property of no person shall be taken or damaged for public use without just compensation therefor."

Twelfth.

The supreme court of Nebraska erred in assuming jurisdiction of said suit in so far as it involves the state or interstate commerce, to-wit: Requiring the appellant company to construct, maintain and operate a switch to connect with its interstate railroad at the station of Strausville, Nebraska, and to connect with the elevator of the Farmers' Elevator Company, of Strausville, Nebraska, for the carriage and transportation of grain from said elevator—all of which was tendered and intended for interstate shippers.

Thirteenth.

The supreme court of Nebraska erred in deciding and holding that Chapter 105 of the Laws of 1905, of Nebraska, and other like statutes, were not invalid in so far as they attempt to compel the appellant company to construct, maintain and operate one of the instrumentalities of an interstate railroad.

Fourteenth.

The supreme court of Nebraska erred in holding and deciding that the judgment of the court below granting an order or writ of mandamus commanding the appellant company (without compensation) to construct, maintain and operate a switch connection at its station of Strausville, and to surrender a portion of its right-of-way for the private use of the Farmers' Elevator Company, of Strausville, was not repugnant to, or in violation of, the Fourteenth Article of Amendment to the Constitution of the United States, and did not deny to the appellant company the equal protection of the laws, and was not depriving the

appellant company of its property without due process of law, and was not in violation of, or repugnant to, Section 8 of Article I of the Constitution of the United States, which provides:

"The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

BRIEF AND ARGUMENT.

In order to avoid repetition, the assignment of errors will be condensed, and considered under four sub-divisions.

FIRST.

The Statute of Nebraska, the basis of the proceedings in the State Court, as construed by that Court, operated in taking the property of the Railway Company for a private use, without its consent and without compensation, in violation of the Fourteenth Article of Amendment of the Constitution of the United States.

The elevator company is a private corporation, incorporated under the laws of Nebraska (Abst., p. 5), and is composed of thirty-one farmers (Abst., p. 26). In May, 1906, the elevator company made a demand upon the railway company "for a site on the right-of-way of the Missouri Pacific Railway at the station of Strausville, Nebraska, for the purpose of constructing an elevator on the said right-of-way at the said station of Strausville, Nebraska, by the said Farmers' Elevator Company" (Abst., pp. 5-6). The railway company having refused to comply with the demand, on August 2d, 1906, made a "written request of you for a side track connecting their elevator at Strausville, Nebraska, with your road, in order that cars may be loaded from this elevator the same as is done at the other elevator at this same station" (Abst., p. 6). This demand not being complied with, the writ of mandamus was applied for (Abst., p. 4). In order to comply with the demand of the elevator company, "it would be necessary to build 960 feet of new track," at a cost of $1,732 (Abst., p. 40). The statute makes no provision for compensation to the railway company, and compensation is not contemplated. It is not pretended that any compensation was tendered by the elevator company. The statute is arbitrary in its requirements. No opportunity is given to the railway company for a hearing before any court or other tribunal, but, upon the demand of any person, it must furnish a "location or site for the building or construction of an elevator on the railroad right-of-way," or, on its failure so to do, it *shall*, on demand, "erect, equip and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of their right-of-way, when necessary to approach

an elevator that may be erected by the applicant, etc." All this must be done against the consent of the railway company, and without compensation, and regardless of the fact that the right-of-way may be so used or occupied by the railway company as to make it impracticable to comply with the requirements of such statute. If, however, "any railroad company, officer or agent thereof, who willfully violates or evades any of the provisions of this act shall be liable to the party injured for all damages by reason of such violation, and, in addition, shall be liable for each offense to a penalty of five hundred dollars, etc."

The state court holds (Abst., p. 73) that, under the statute, the railway company has no discretion in the premises, and when the elevator is constructed and the demand made, its reasonableness cannot be questioned, but that it must comply with the demand, or suffer the consequences. Is not such a statute in conflict with the Constitution of the United States, as depriving the company of its property without due process of law, and depriving it of the equal protection of the law?

Chicago, etc., Ry. Co. v. *Minnesota*, 134 U. S., 418.

As was said in that case of the law under consideration, it may be said of this Nebraska statute, as construed by the highest court of that state: "It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality," the *fact* that an elevator has been constructed near the right-of-way, and the owner wants

and has demanded the construction of a switch track by the railway company, at its expense, for his convenience and accommodation. Can such be the law? If so, when will the right conferred by this statute be exhausted? There is in the statute no restriction or limitation as to the number of elevators to be thus accommodated at the expense of the railway company. If one has the privilege and right under the statute, so has another, and so on *ad infinitum*. And no tribunal, judicial or administrative, has the right, power or jurisdiction, under the statute, to hear and determine as to the *necessity* of another elevator, or as to the *reasonableness* of the demand.

But has not this court settled this question and this controversy adversely to the elevator company in *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S., 403? In that case application was made for an elevator site on the right-of-way of the railway company, under a statute of Nebraska, which is copied in statement of the case (164 U. S., 404-406). The supreme court of Nebraska "construed this statute as authorizing the board of transportation to make the order * * * which required the railroad company to grant to the relators the right to erect an elevator upon its right-of-way at Elmwood Station, on the same terms and conditions upon which it had already granted to other persons rights to erect two elevators thereon." Thereupon the court said: "The construction so given to the statute by the highest court of the state must be accepted by this court in judging whether the statute conforms to the Constitution of the United States" (134 U. S., 418-456; 163 U. S., 142-152). And, upon the facts of the case, decided that:

> "The taking by a state of the private property of one person or corporation, without the owners' consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

What is the difference in principle between that case and the one under consideration? In that case the attempt was to secure a site on the company's property. In this case to compel the railway company to give up that portion of its right-of-way for a switch or track, for the private use of the elevator company, and, in addition thereto, to construct the same at a cost of $1,732. The law under consideration does not contemplate the exercise of the right of eminent domain, but arbitrarily compels the railway company to surrender its property, without compensation, to the use and benefit of another.

In the case of *C., B. & Q. R. R. Co. v. Chicago,* 166 U. S., 226, it was said that:

> "A judgment of a state court, even if authorized by statute, whereby private property is taken for *public* use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States."

Hartford Ins. Co. v. *R. R. Co.,* 175 U. S., 99.

Is not the statute of Nebraska, as construed by the Supreme Court of that state, void, within the recent decision of this court in *L. & N. R. R. Co.* v. *Stock Yards,* 212 U. S., 132—in which the court said:

> "The law must save the rights of parties, and not leave them to the discretion of the courts as such.

Where a general provision in the constitution of a state is void, as taking property without due process or compensation, and compensation has not been provided by statute, the defect cannot be cured by the courts inserting provisions for compensation in judgments under such constitutional provision.

The duty of a carrier to accept goods tendered at its station does not require it to accept cars offered by competing roads at arbitrary points near its terminus for the purpose of using its terminal station. A law requiring the carrier so to do is unconstitutional, as taking property without due process of law."

L. & N. R. R. Co. v. *West Coast Co.*, 198 U. S., 483.

In the case of *Hartford Ins. Co.* v. *R. R. Co.*, 175 U. S., 99, in which the principle announced in *R. R. Co.* v. *Nebraska*, 164 U. S., 406, is reaffirmed, this court said that:

"A railroad corporation holds its station grounds, railroad tracks and right-of-way for the public use for which it is incorporated; yet as *its private property*, and to be occupied by itself, or by others, *in the manner which it may consider* best fitted to promote or not to interfere with the public use. It may, *in its discretion*, permit them to be occupied by others with structures convenient for the receiving and delivering of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers (*R. R. Co.* v. *Richardson*, 91 U. S., 454). And it must provide reasonable means and facilities for receiving goods offered by the public to be transported over its road (*Stock Yards* v. *Keith*, 139 U. S., 128). But it is not obliged, and cannot even be compelled,

> by statute, against its will, to permit private persons or partnerships to erect and maintain elevators, warehouses or similar structures, for their own benefit, upon the land of the railroad company (*Mo. Pac. Ry. Co.* v. *Nebraska*, 164 U. S., 403)."

Davidson v. *New Orleans*, 96 U. S., 97-102;

Loan Assn. v. *Topeka*, 20 Wall., 655, 663.

In re 20 Wall., 664, Justice Miller said:

> "To lay with one hand the power of the Government on the property of the citizen, and with the other to bestow it upon favored individuals, to aid private enterprises, and build up private fortunes, is none the less robbery because it is done under the forms of law, and is called taxation."

A careful reading of the statute of Nebraska under which this proceeding was instituted will disclose the fact that the railway company has no voice whatever in the matter. It cannot be heard to show that its terminal grounds and yards are so laid out and operated that to comply with the demand of "all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain, etc.," for a "side track or switch of suitable length, etc.," would disable it from discharging its duties to the public as a common carrier, and cause it irreparable loss and damage. The safety of the traveling public may not be considered, but all such matters are subordinated to the whim or caprice of any person who wants, or thinks he wants, a side track or switch to his elevator. The construction and proper operation of terminals at stations is the most important part of railroad construction and operation, and requires great engineering

skill and experience; and no such statute, as a matter of public policy, should be sustained which does not delegate to or vest in some tribunal, judicial or administrative, the power, upon due notice to the railway company, "to hear and investigate the same, and determine as to the safety and practicability thereof, and justification and reasonable compensation therefor," as is provided in Section 1 of the Hepburn Bill.

As construed by the state court—in fact, without such construction—this statute of Nebraska "neither contemplates nor allows any issue to be made, or inquiry to be had," as to the reasonableness or safety of the "side track or switch" demanded (134 U. S., 456); that, in a proceeding for a mandamus, under the statute, there is no fact to traverse except the violation of the law in not complying with the demand of the person who wants the "side track or switch." In *ex parte Young*, 209 U. S., 148, there was no way to test the reasonableness of the rates, except by violating the law. To impose upon the "party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given), only upon the condition that, if successful, he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close all approaches to the courts, and thus prevent any hearing upon the question whether the rates, as provided by the acts, are not too low, and therefore invalid." The Nebraska statute is even more arbitrary than the statute under consideration in *ex parte Young, supra.*

A law which "hears before it condemns" is due process of law. A law which condemns before it hears is *not* due process of law, under the guarantees of the

Federal Constitution. "To give to the clause of the Constitution which guarantees that 'no person shall be deprived of life, liberty or property without due process of law' any value it must be understood to mean that no person shall be deprived, by any form of legislation or governmental action, of either life, liberty or property, except as the consequence of some judicial proceeding, appropriately and legally conducted. It shows that a law which, by its own inherent force, extinguishes rights of property, or compels their extinction, without any legal process whatever, comes directly in conflict with the Constitution."

As said by this court in *Simon* v. *Craft*, 182 U. S., 427: "The essential elements of due process of law are notice and opportunity to defend."

In the opinion of the State Court (Abst., p. 73) the startling proposition is announced that: "To make the railroad company the sole and ultimate judge of the place or building from which it will receive its freight, or to dictate to the public the party to whom the produce of the country shall be delivered or sold, would give such corporations power to control the market of the country, and to grant a monopoly in favor of any party whom it might choose, and to promote or retard at pleasure the growth or prosperity and welfare of cities and towns"; and therefore it was held that the owner of the elevator should be "the sole and ultimate judge" as to the manner the railroad company should construct and manage its terminals. The State Court overruled or ignored the principle announced by this Court in *Inter. Comm. Com.* v. *C. G. W. Ry. Co.*, 209 U. S., 108, in which it was said that:

> "Railroads are the private property of their owners, and, while the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, the public is in no sense a general manager."

The Farmers' Elevator Company, although incorporated, is a private concern, engaged in the prosecution of a private business and enterprise, and has no better standing in court under the Nebraska statute than any person or voluntary association would have, and, while the action is brought in the name of the state, the object of the action is to enforce a private right claimed to have been conferred by the statute. It is said by the State Court that:

> "It is true that there are one or more elevators at the station of Strausville, but the farmers in that vicinity do not seem willing to deal with the parties operating them, and have invested their money in the erection of another one, of the requisite capacity, and this expenditure is evidence, of a satisfactory character, of some reason existing for another elevator at that place."

In other words, the farmers have formed a combination, as a private enterprise, to control the price of grain at that station. At all events, the entire evidence demonstrates that the organization is private, and not public, and that the terminals of the railway company must be surrendered, without compensation, to the use of the elevator company.

Traction Co. v. *Mining Co.*, 196 U. S., 251-252.

Second.

The Statute of Nebraska, on its face, is class legislation, in this: That its operation as to elevators "HEREAFTER" constructed is restricted to those having a capacity of fifteen thousand bushels.

The classification provided by the statute is arbitrary and unreasonable. It provides "that any elevator *hereafter* constructed, in order to receive the benefits of this act, must have a capacity of not less than fifteen thousand bushels."

An elevator constructed *prior* to the taking effect of the statute, of *whatever capacity*, either *more or less* than fifteen thousand bushels, may have the benefits secured by the statute, and may require the railway company to construct a side track or switch to its elevator located just off the right-of-way. For this reason the statute is void.

The legislature of Kansas adopted a law providing that:

> "This act shall apply *only* to corporations or trusts or their agents, lessees or business managers, *that employ ten or more persons.*"

In the case, *State* v. *Haun*, 61 Kan., 146, the Supreme Court of Kansas held the entire act unconstitutional, as being class legislation, and the principle of that decision was approved by this Court in *Cotting* v. *Godard*, 183 U. S., 79.

Leeper v. *Texas*, 139 U. S., 462.

Third.

Upon the conceded facts, the State Court was without jurisdiction in the premises, and its order and judgment in violation of the Constitution of the United States, and the laws of Congress, passed in pursuance thereof.

There is no controversy disclosed by the record as to the following facts, viz.:

a. The railway company is a common carrier of freight and passengers, incorporated under the laws of the State of Missouri, and owns and operates a line of railway into and through the states of Nebraska, Kansas and Missouri, and elsewhere.

b. The elevator of the elevator company at Strausville was constructed and used for the purpose of loading grain therefrom into the cars of the railway company, and shipping it to points in Kansas and Missouri.

c. The switch or spur demanded by the elevator company was to connect with the main line of the railway company, and was to be used by the elevator com- in Kansas and Missouri.

It is provided by the act of Congress of June 29th, 1906, known as the "Hepburn Bill," that the act "shall apply to any corporation, etc., * * * and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad * * * from one state or territory of the United

States * * * to any other state or territory of the United States" * * * and that "the term 'railroad,' as used in this act, shall include * * * all the road in use by any corporation operating a railroad; * * * and shall also include all switches, spurs, tracks and terminal facilities, of every kind, used or necessary in the transportation of the persons or property designated herein. * * *"

It is also provided by Section 1 of the Hepburn Bill that:

> "Any common carrier subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain and operate, upon reasonable terms, a switch connection, with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable, and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability, without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the commission, as provided in Section 13 of this act, and the commission shall hear and investigate the same, and shall determine as to the safety and practicability thereof, and justification and reasonable compensation therefor, and the commission may make an order, as provided in Section 15 of this act, directing the common carrier

to comply with the provisions of this section, in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money."

It is also provided by Section 16 that:

"If any carrier fails or neglects to obey such order of the commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the commission in its own name, may apply to the Circuit Court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries, and make such investigations, through such means as it shall deem needful, in the ascertainment of the facts at issue, or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus."

In specific terms the Hepburn Bill provides that: "The provisions of the act shall apply * * * to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad * * * from one state * * * to any other state, etc." Therefore, upon the undisputed facts of this case, the Missouri Pacific Railway Company is subject to the provisions of the act. As specifically defined by that act, the term "railroad" includes all the switches, spurs, tracks and terminal facilities, of every kind, *used* or necessary to be *used* in the transportation or delivery of the persons or property designated herein, and also all freight depots, yards and grounds used, or necessary, in the transportation or delivery of any of said property, etc.

The undisputed evidence discloses the fact that the terminals, switches, spurs, etc., of the railway company were used, and necessary to be used, in the discharge of its obligations to the public. Therefore, Congress wisely provided that: "Any common carrier subject to the provisions of this act, upon application * * * of any shipper tendering interstate traffic for transportation, shall construct, maintain and operate, upon reasonable terms, switch connections, etc. * * * where such connection is *reasonably practicable, and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance of the same.*" If the carrier fails to do so, then the "commission shall hear and investigate the same, and shall determine *as to the safety and practicability thereof, and the justification and reasonable compensation therefor*, etc."

The Nebraska statute is in direct conflict with the act of Congress. The one is arbitrary; makes no provision for notice, reasonableness or compensation. The other provides for a hearing and compensation. The one is extreme and populistic in all of its terms; the other is wise, reasonable and just. Congress has also provided the remedy for violation of the commission's orders, and designated the tribunal for its enforcement.

In re Ry. Co. v. *Inter. Com.*, 162 U. S., 940, it was said by this Court that:

> "It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a state), etc."

And in *Armour* v. *U. S.*, 209 U. S., 78, it was said that:

> "The purpose of Congress to embrace the *whole* field of interstate commerce is made apparent by the exclusion only of *wholly* domestic commerce."
>
> *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Co.*, 204 U. S., 430, 452.

In the early case of *Wilson* v. *The Blackbird*, 2 Peters (U. S.), 250, Chief Justice Marshall, while holding, in the absence of *all legislation* by Congress, "a state has power, etc.," yet stated that:

> "If Congress had passed any act which bore upon the case, *any act* in execution of the power to regulate commerce, the object of which was to control state legislation, etc., * * * we should feel not much difficulty in saying that a state law coming in conflict with such act would be void."

The statute of Nebraska, as construed by the State Court, is an attempted regulation of the conduct of a carrier subject to the provisions of the act of Congress, and of the instrumentalities and facilities of that carrier used and necessary to be used in interstate commerce.

In the case of *Welton* v. *The State*, 91 U. S., 280, speaking of the term "commerce," this Court said:

> "The power to regulate it embraces all the *instruments* by which such commerce may be conducted."

In the case of *Sherlock* v. *Alling*, 93 U. S., 103, speaking of the *instruments* by which interstate commerce is carried on, this Court said:

> "Whatever, therefore, Congress determines, either as a regulation or the liability for its infringement, *is exclusive of state authority.*"
>
> *R. R. Co.* v. *Husen*, 95 U. S., 469.

In the case of *Hall* v. *DeCuir*, 95 U. S., 489, it was said that:

> "If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship."

And this Court has repeatedly affirmed the proposition that:

> "Congress having legislated upon the subject, it cannot be that the state legislature have a right to interfere, and prescribe additional regulation, as the legislation of Congress clearly indicates that the national lawmakers never intended to leave anything open upon the subject to the discretion of the state legislature."

What did Congress mean in the Hepburn Bill by its comprehensive definition of the term "railroad," in Section 1 of the act? Did Congress mean to assume exclusive or only partial control, supervision and jurisdiction over the "railroad," as thus specifically defined and described? Is it not apparent that it was the intention of Congress to exclude the state from any control over the carrier subject to the provisions of the act, and the instrumentalities in use by such carrier, in handling and transporting interstate commerce? There is in the act no ambiguity, and it seems to be well settled that "where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room for construction."

> "Construction and interpretation have no function where the terms of the statute are plain and certain, and its meaning is clear. In such a case, Congress must be presumed to mean what it has plainly expressed."
>
> *Lake Co.* v. *R. R. Co.*, 130 U. S., 670.

The intent and purpose of the "act to regulate commerce" was fully considered by this Court in *Ry. Co.* v. *Inter. Comm. Com.*, 162 U. S., 211, long before the passage of the Hepburn Bill in 1906, and if, as said by the Court in that case, *i. e.*, that "Congress had in view the whole field of commerce," we submit that the amendments incorporated in the Hepburn Bill disclose a purpose on the part of Congress to remove all possible doubt, and hence the term "railroad" was defined to include "all switches, spurs, tracks and terminal facilities of every kind * * * and also all freight

depots, yards and grounds used, or necessary to be used, by such carrier subject to the provisions of the act."

The railway company being an interstate carrier, and the elevator company desiring a side track or switch from the railway company's line of road to its elevator, to be used in the shipment of grain therefrom to Kansas and Missouri, the right to such switch or side track was given by the terms and under the conditions prescribed by Section 1 of the Hepburn Bill. (See Sec. 16, Hepburn Bill.)

> "Where a right arises under a law of the United States, Congress may, if it sees fit, give to the Federal Courts exclusive jurisdiction."

When a right is given by statute, and a specific remedy provided, or a new power, and also the means of executing it, are therein granted, the power can be executed and the right vindicated in no other way than that prescribed by the act. The Interstate Commerce act, providing that remedies thereunder must be sought in the United States Court, or before the Interstate Commerce Commission, by necessary implication excludes the idea of jurisdiction in any other tribunal. The act confers the rights and provides the remedy and means of enforcement.

Copp v. *R. R. Co.*, 43 La. Ann., 511.

Dudley v. *Mayhew*, 3 N. Y., 9.

The Moses Taylor, 4 Wall. (U. S.), 411.

Gulf, Col., etc., Ry. Co. v. *Hefley*, 158 U. S., 99, in which Mr. Justice Brewer said:

> "When a state statute and a Federal statute operate upon the same subject matter, and prescribe different rules concerning it, and the Federal statute is one within the competency of Congress to enact, the state statute must give way."

In *R. R. Co.* v. *Haber*, 169 U. S., 613-626, it was said:

> "A state statute, although enacted in pursuance of a power not surrendered to the General Government, must, in the execution of its provisions, yield in cases of conflict to a statute constitutionally enacted under authority conferred upon Congress; and this without regard to the source of power whence the legislature derived its enactment."

FOURTH.

The State Statute, upon its face and as construed by the Court, is arbitrary and unreasonable—denies to the Railway Company the equal protection of the law; deprives it of its property without compensation and without due process of law.

The order and mandate of the State Court is arbitrary and unreasonable, and no justification can be found for it in the record. If the statute of Nebraska can be sustained, railroad property is held by an uncertain and precarious tenure. The finding of fact made by the court, the basis of the judgment (Abst., pp. 15-16), is that:

"The elevator in controversy was built adjacent the right-of-way of the respondent company's railroad at Strausville, in Richardson County, Nebraska, and was completed and in operation prior to the first day of April, A. D. 1905, and that said elevator has a capacity of 15,000 bushels or more. The court further finds that, on the 31st day of May, 1906, an application was made in writing by the relator to the respondent for a site for the construction of an elevator on respondent's railroad right-of-way at the said station of Strausville, and that, after a period of more than sixty days had passed, the respondent company had wholly failed, refused and neglected to grant the site as requested; that on the 2d day of August, 1906, the relator requested the respondent in writing to build a side track connecting relator's elevator at the said station of Strausville with respondent's railroad, and that said request has been wholly disregarded."

There is no finding of any necessity for another elevator at that station; no finding as to the terms and conditions upon which the other elevator is operated; no finding as to any compensaion to be paid the railway company; no opportunity for the railway company to be heard as to the reasonableness of the demand, for that is precluded, and foreclosed by the statute.

We submit, therefore, that the statute is void; that the order and mandate is unreasonable and arbitrary, and that the judgment of the State Court should be reversed.

BALIE P. WAGGENER,
JAMES W. ORR,
Attorneys for Plaintiff in Error.

JAN 2 1910
JAMES H. McKENNEY,

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 127.

THE MISSOURI PACIFIC RAILWAY COMPANY
Plaintiff in Error

v.

THE STATE OF NEBRASKA,
Defendant in Error.

BRIEF OF THE STATE OF NEBRASKA

WILLIAM T. THOMPSON, Attorney General,
GRANT G. MARTIN, Deputy Attorney General.

IN THE

Supreme Court of the United States.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

v.

THE STATE OF NEBRASKA,
Defendant in Error.

BRIEF OF THE STATE OF NEBRASKA

STATEMENT.

For many years prior to the legislation hereinafter referred to a combination existed in the state of Nebraska between the grain dealers and the owners of elevators to control the price of grain, and, as a result, the producer was compelled to sell his products at a price much below their true market value. The legislature sought to remedy this evil and enacted chapter 105 of the Session Laws of 1905, which so far as is material to this case is as follows:

"Every railroad corporation shall give to all persons and associations reasonable and equal terms for

the transportation of any merchandise or other property of every kind and description, upon any railroad owned or operated by such corporation within this state, and for terminal handling the use of the depot and other buildings and grounds of such corporation, and at any point where its railroad shall connect with any other railroad, reasonable and equal terms and facilities of interchange and shall promptly forward merchandise consigned or directed to be sent over another road connecting with its road, according to the directions therein or accompanying the same; and every railroad company or corporation operating a railroad in the state of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right of way and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made shall erect, equip, and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of their right of way when necessary and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants adjacent to their right of way for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favoritism or discrimination in any respect whatever. Provided, however, that any elevator hereafter constructed, in order to receive the benefits of this act, must have a capacity of not less than fifteen thousand bushels. And such railroad company shall supply cars to individuals shipping their own grain on an equality with persons, associations, or corporations owning, operating or controlling such elevators or en-

gaged in the business of buying and shipping by loading directly into the cars.

"Any railroad company, officer or agent thereof who willfully violates or evades any of the provisions of this act, shall be liable to the party injured for all damages sustained by reason of such violation, and in addition thereto, shall be liable for each offense to a penalty of five hundred dollars ($500), which may be recovered by the county attorney in an action brought in the name of the State of Nebraska in any county by an action in the district court where such railroad company or corporation is doing business."

This action was commenced by the county attorney of Cass county in May, 1906. The Missouri Pacific Railway Company is incorporated under the laws of the state of Missouri, and operates its line of railway through several states. Manley is a little village of about two hundred inhabitants, located on the railway company's line of railway in said Cass county. Said railway company permitted two elevators, operated by private parties, to be erected on its right of way in said village. The producers in the territory tributary to said village were unable to sell their products to the grain dealers in said village at their true market value. In the year 1904, under the laws of the state of Nebraska, said producers organized the Manley Co-Operative Grain Association, the object of which was to buy, sell and handle grain in said village. At first they operated what is known as a scoop-house, in which they received grain from the farmers, then loaded it from the scoop-house into wagons and hauled it to the cars of said railroad company. By this proc-

ess they were enabled to load only two cars a day, whereas their competitors who were running the two elevators were able to load one car an hour. Fifty farmers in that community were stockholders of this grain association, who owned about 10,000 acres of land. About eighty per cent of the land in and about said village was of fine agricultural character. Said grain association shipped from said scoop-house during the first year about 50,000 bushels of grain. This association determined to erect an elevator and on October 21, 1905, made application to The Missouri Pacific Railway Company for the privilege to erect an elevator on its right of way so as to be on equal terms with its competitors. On October 28, 1905, it received reply from said railway company to the effect that said application would not be granted, for the reason there was a sufficient number of elevators located on its right of way at Manley to take care of the business originating at that station. On November 8, 1905, said association wrote to said railway company that it had procured a tract of land adjacent to its right of way and near the south end of its side track as now located, and stated that the purpose of the association was to construct an elevator of at least 15,000 bushels capacity with a request that said railway company comply with the law, as quoted aforesaid, and extend its said side track so that grain might be loaded from said proposed elevator. Said communication also stated that the association was made up of representative and substantial farmer residents in that com-

munity, and that it shipped during the past year nearly 50,000 bushels of grain over the company's railroad by loading in cars on the side track. The association again renewed its application for permission to construct an elevator on the railway company's right of way, and thereby obviate the necessity of building its elevator on its own land and causing the expense of extending the track. It also proposed to said railway company that if it would forthwith construct, or contract to construct, said side track, the association would be willing to pay an equitable share of the expenses caused by extending the side track. In reply to said communication the association received the following letter:

"Atchison, Kans., Nov. 22nd, 1905.
Mr. J. B. Cleghorn,
Secretary Manley Co-Operative Ass'n,
Manley, Neb.
Dear Sir:
With the acknowledgement of the receipt of your favor of Nov. 8th, I beg to say, that so far as I am aware, there is no change in our position. We will not lease you a portion of our ground, upon which to erect an elevator, nor will we give you trackage privilege, to load from such a structure, if erected on your individual property.

Yours truly,
J. Russell,
JR-N. Superintendent."

Thereupon said association constructed an elevator on its own land adjacent to said right of way, again offered to bear an equitable share of the expenses of

extending the side track, and demanded of said railway company that it lay tracks on its right of way within four feet of the elevator so erected. Similar demands were repeatedly made by the grain association but refused by the railway company. Proper notices, complying with the law aforesaid, were served upon the railway company, and this action was commenced to recover the penalty provided by statute for failure to comply with said law. The State of Nebraska recovered judgment for the penalty provided by law, and on appeal by The Missouri Pacific Railway Company said judgment was affirmed by the supreme court of Nebraska. Four defenses were interposed by the railway company, (1) that the state court had no jurisdiction of the subject-matter of this action, that the same is within the exclusive jurisdiction of the United States and is subject only to the control of Congress, under the commerce act of June 30, 1906, the railway company being an interstate carrier and the grain to be handled by said association being intended for interstate shipment,(2) that the act in question is repugnant to the fourteenth amendment of the constitution of the United States, in that it deprives said railway company of its property without due process of law, (3) that said act is violative of section 21, article 1, Nebraska Constitution, in that it takes and damages its property without just compensation, (4) that it is violative of section 15, article 3, Nebraska Constitution, in that it is special

and class legislation applying only to elevators of not less than 15,000 bushels capacity.

ARGUMENT.

Counsel for the railway company contend for the broad proposition that the general government has exclusive jurisdiction over all matters affecting the means, instruments and facilities employed by transportation companies conducting a business in more than one state. In other words, they contend that if such companies are operating lines in two or more states and doing, in part, an interstate business they are entirely exempt from the operation of state legislation. The following paragraph is quoted from their brief filed in the supreme court of Nebraska:

"Under the power expressly conferred by the constitution 'to make all laws which shall be necessary and proper for carrying into effect the foregoing powers, and all other powers vested by the constitution in the government of the United States, or any department or officer thereof,' Congress has deemed it 'necessary and proper,' for carrying into execution the power to regulate commerce * * * among the states,' to legislate, not only with reference to commerce itself, but has taken control of the regulation of *all* the instrumentalities of interstate commerce, and thereby expressly precluded the state from *any* control over or interference with such instrumentalities."

In assuming this position they entirely ignore the fact that all transportation companies doing an interstate business are at the same time engaged in a distinctively *intra*-state traffic. Such a system would en-

able the general government to usurp control over local state traffic and rob the state of its inherent power to control and regulate its internal commerce and the means and instruments which conduce to the same. So far as transportation companies operating in two or more states are concerned, they necessarily act in a dual capacity and render a dual public service. They perform a service originating and terminating within the state and also a service of an interstate character. Now, the dual character of this public service requires a dual system of regulation, the one subject to the state, the other to the nation.

While the general government is permitted to reach within the limits of all the states and exercise regulating powers to promote and protect commerce among the states, it must be conceded that numerous decisions have irrevocably committed this court to the proposition that each state has the inherent power to regulate all commerce within its limits of purely an internal character.

In discussing the phrase "among the several states," Chief Justice Marshall said:

"It is not intended to say, that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. * * * The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes

of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself." (*Gibbons v. Ogden*, 9 Wheat. 194, 195.)

"The internal commerce of a state—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government." (*Sands v. Manistee R. Imp. Co.* 123 U. S. 288.) (See also *Wabash, St. L. & P. Ry. Co. v.* Illinois, 118 U. S. 557; *The Daniel Ball*, 77 U. S. 557.)

We concede that the exclusive power to regulate interstate commerce belongs to Congress, but we also insist that the jurisdiction of the state over its commerce of a purely domestic character is equally exclusive. The state has no right to invade the domain of the federal government, neither has the latter any right to invade the domain of the state.

"A railroad corporation created by a state is for all purposes of local government a domestic corporation, and its railroad within the state is a matter of domestic concern. Even when its road connects, as most railroads do, with railroads in other states, the state

which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the state. They are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States." *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 333, 334; *Smith v. Alabama*, 124 U. S. 465, 481, 482; *Hennington v. Georgia*, 163 U. S. 299, 308, 317; *New York, New Haven & Hartford Railroad v. New York*, 165 U. S. 628, 632." (*Gladson v. Minnesota*, 166 U. S. 430.)

It is argued that the act of Congress approved June 30, 1906, entitled, "An act to regulate commerce," fairly construed, lodges in the Interstate Commerce Commission exclusive control over interstate carriers and all of their instrumentalities, simply because they are engaged in interstate commerce, notwithstanding they may be also engaged in business originating and terminating within the boundaries of a single state. The principle contended for worked the undoing of the employers liability law, and Justice White, in the opinion of this court, announced the rule that Congress

does not derive from the constitution exclusive power over all the instrumentalities of interstate carriers simply because they are interstate carriers and engaged partly in interstate commerce, but such power is exclusive only when such instrumentalities are used in carrying on interstate commerce. In other words, the court held that one engaging in interstate commerce does not thereby submit all his business to the regulating power of Congress. (*The Employers Liability Cases*, 207 U. S. 463.) The interstate commerce act does not go to the extent contended for by counsel. It is limited to the regulation of the business of interstate commerce as will be seen by the following provision thereof:

"Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid."

The obvious purpose of this proviso was to have it entirely clear that Congress, in this act, was attempting to regulate only such commerce as the constitution placed under its control. This court held in the *Trade Mark Cases*, 100 U. S. 82, that an act of Congress which by its terms was applicable to *intra*-state transportation as well as to interstate commerce was repugnant to the constitution.

Furthermore, the act of June 29, 1906, commonly known as the Hepburn law, which is invoked by counsel,

did not become operative until August 28, 1906, whereas this cause of action against plaintiff in error accrued on February 9, 1906, and this action was commenced on May 17, 1906. Hence, the provisions of said act cannot be urged as a defense in this case, even if applicable thereto.

The evidence in this record is amply sufficient to justify the assertion that, prior to the time the Manley Co-Operative Grain Association commenced business in Manley a combination existed between the grain buyers operating the two elevators located on the railway company's right of way, which enabled them to secure the grain products of that community at prices from two and one-half to four cents per bushel below the actual market value of the same. (Trans. 24, 25.) When the farmer tendered his corn to these buyers the price offered by both was the same, being from eight to ten cents below the Omaha market although the haul from Manley to Omaha is less than thirty miles and the difference in the market prices between the two points should not exceed four cents per bushel. (Trans. 50.)

Conceding, for the sake of argument, that the two elevators are sufficient to handle all the grain shipped from Manley, still the farmers of that community are entitled to facilities which will protect them from discriminations and afford a fair price for their produce. What higher duty can devolve upon public carriers than to furnish such facilities?

Furthermore, the record sustains us in saying that the railway company was not only opposed to providing the Manley Co-Operative Grain Association with track facilities when the latter had offered to contribute a reasonable proportion of the cost thereof, but said railway company was disposed to discriminate in favor of the elevators located on its right of way in the matter of furnishing cars. (Trans. 63.)

The argument that the grain which the grain association shipped was destined for markets beyond the confines of Nebraska and, hence, an article of interstate commerce over which the Interstate Commerce Commission had jurisdiction, must necessarily fall in view of the evidence in relation thereto. The record shows that the manager of the grain association sold most of the grain handled by his company to the Nebraska Hay & Grain Company, of Omaha, Nebraska, which city is seventh in the Union in point of grain receipts, and that under the directions of the vendee some of the grain was billed and shipped to Omaha and the bulk of it to cities outside of Nebraska. (Trans. 44.) This establishes the fact that at least part of the traffic carried on by the grain association was solely state commerce subject exclusively to state regulation. This state of the evidence obviates the necessity of entering upon a discussion of the authorities which hold that produce does not become a matter of interstate commerce until actually delivered to the carrier to be transported beyond the boundaries of the state.

"When the (interstate) commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state." (*In re Greene*, 52 Fed. 113; *Coe v. Errol*, 116 U. S. 517.)

As to the contention that this act is special and class legislation, and hence repugnant to section 15, article 3, Nebraska constitution, we answer:

First. That this question is foreclosed by the decision of the supreme court of Nebraska in this case. Its decision in relation thereto will be followed by this court. (*Covington v. Kentucky*, 173 U. S. 231; *Iowa Life Insurance Co. v. Lewis*, 187 U. S. 335; *Manley v. Park*, 187 U. S. 547.)

Second. That the classification limiting the applicability of the law to elevators having a capacity of at least 15,000 bushels is greatly to the advantage of the railway company in that it does not require the building of side tracks to small and insignificant elevators, the business from which might not justify the expense incurred.

Third. The class made by the statute is reasonable, and general in its terms. It operates on all alike and is restricted to no locality.

Fourth. The supreme court of Nebraska has repeatedly passed upon this question. In *Hunzinger v.*

State, 39 Neb. 653, Hunzinger was indicted for selling intoxicating liquor without a license under a statute which provided that county commissioners could not issue a license within two miles of any incorporated city or village; provided, county commissioners could issue a license within two miles of any incorporated city having a population of 150,000 or over. Hunzinger's contention was that this was special and class legislation, but the court held it was not, and in the opinion announced the rule as follows:

"If a law is general in its terms, and restricted by its terms to no particular locality, and operates squarely upon all the group of objects, it is not special law." (*Hunzinger v. State*, 39 Neb. 653.) (See also *State v. Berka*, 20 Neb. 375; *State v. Graham*, 16 Neb. 74; *McClay v. City of Lincoln*, 32 Neb. 412; *Van Horn v. State*, 46 Neb. 62; *State v. Robinson*, 35 Neb. 401; *Livingston Bldg. & L. Assn. v. Drummond*, 49 Neb. 200.)

In answer to the contention that the act seeks to take or damage property without just compensation or due process of law, we state:

First. That the side track proposed to be constructed is not a private side track to private grounds. It is a side track to be constructed upon right of way of plaintiff in error over which the railway company retains the complete title, exercises absolute control and is at liberty to use in whatsoever manner it may see fit. In case the side track is constructed no part thereof is to be devoted to the exclusive use of the

elevator association. It is designed to be a facility which will enable the railway company to better serve its patrons and more expeditiously perform its own work. This side track must ever remain a part of the railroad and hence a part of the public highway of the state. (*Roby v. State ex rel Farmers Grain Co.* 107 N. W. 766 (Neb.); *Rock Creek Township v. Strong*, 96 U. S. 271; *Black v. Philadelphia & R. R. Co.* 58 Pa. 249.)

Counsel cite the case of *Missouri Pacific Ry. Co. v. State ex rel* 164 U. S. 404, in support of the proposition that the railway company's property is taken by the enforcement of this statute without just compensation. This case is not in point for the reason that the statute under consideration in that case expressly provided that the railroad company should give a site on its right of way to the elevator company on which to build an elevator. This case was based upon a statute requiring the railroad company to permit the erection of a permanent structure upon its right of way which would compel the railroad company to turn over to the elevator company the exclusive use and occupation of a portion of its right of way, whereas in the case at bar the railway company is not deprived of complete control and use of any portion of its right of way. In that case this court said:

"The record does not present any question as to the power of the legislature to compel the railroad company to erect and maintain an elevator for the use of the public, or to compel it to permit to all persons

equal facilities of access from their own lands to its tracks for the purpose of shipping or receiving grain or other freight. * * * The order in question was not limited to temporary use of tracks, nor to the conduct of the business of the railway company. But it required the railway company to grant to the petitioners the right to build and maintain a permanent structure upon its right of way." (*Missouri Pacific Ry. Co. v. State ex rel* 164 U. S. 404.)

But counsel contend that to be compelled to make an outlay of $450 on this side track the railway company would be damaged and its property taken without just compensation. In this connection it must not be forgotten that the undisputed evidence discloses that the Manley Co-Operative Grain Association is composed of fifty farmers owning at least 10,000 acres of rich farm lands in the immediate vicinity of the village and that the products of this land and the products of others who might wish to transact business with the association were to be shipped over the road of plaintiff in error, which is by the constitution of Nebraska made a public highway of the state and is, therefore, subject to the control of the legislature. Moreover, the grain association was organized for the purpose of serving the public, and the public in general was interested in the operation of the elevator.

Under a Minnesota statute railroad companies were required to put in a switch in order to make proper connections between the roads for transfer of traffic. In a case under this statute the objection was interposed that their property was being taken and damaged

without just compensation. This court disposed of that objection in the following words:

"Railroads have from the very outset been regarded as public highways, and the right and duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation is governmental in its nature. At the present day there is no denial of these propositions. *Olcott v. Dond Du Lac County Supers*, 16 Wall 678; *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641; *U. S. v. Joint Traffic Ass'n* 171 U. S. 505.

"It is because they are such highways that the land upon which the rails are laid, and also that which may be necessary for other purposes of the corporation, is said to be used for a public purpose. * * * The companies hold a public franchise, and governmental supervision is therefore valid. They are *organized* for the *public interests* and to subserve *primarily* the *public good* and *convenience*." (*Wisconsin M. & P. R. Co. v. Jacobson*, 179 U. S. 295.)

The police powers of the state include questions of public welfare and convenience as well as questions of public health and morals. (*Lawton v. Steele*, 152 U. S. 133; *Munn v. Illinois*, 94 U. S. 113; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210.)

Under the provisions of a statute of North Carolina a corporation commission, created by the statute and clothed with the necessary power, entered an order directing two interstate carriers to make and keep a certain schedule of time of meeting of passenger trains

at a station where their lines crossed, even though a loss would accrue thereby to the local business of the roads. The case was carried to the United States supreme court, and in answer to the argument that such statute in its operation would take and damage the property of the interstate carrier without just compensation and without due process of law, the court in the opinion said:

"The elementary proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine." (*Atlantic Coast Line v. North Carolina Corporation Commission*, 206 U. S. 19.)

Chicago, B. & Q. R. Co. v. Cutts, 94 U. S. 155; *Piek v. Chicago & N. W. R. Co.* 94 U. S. 164; *Wisconsin M. & P. R. Co. v. Jacobson*, 179 U. S. 287; *Atlantic Coast Line R. Co. v. Florida*, 203 U. S. 256.

It is well settled that a railroad company, as an interstate carrier, may be compelled by state authorities to furnish necessary facilities and convenience to accommodate the public within the state even though it suffer loss thereby.

"The primal duty of a carrier is to furnish adequate facilities to the public, that duty may be well compelled, although by doing so as an incident some

pecuniary loss from rendering such service may result." (*Atlantic Coast Line R. Co. v. North Carolina Corp. Com.* 206 U. S. 26.)

In this case the railroad company will suffer no loss by affording this facility. It will receive, through the grain association, the products of at least 10,000 acres of rich agricultural lands owned by its members and in addition thereto large quantities of grain purchased by the grain association from the farmers in the surrounding country. Since its organization and up to the time of the commencement of this suit the grain association has shipped over its road 130,000 bushels of grain, paying therefor as freight over $3,000. This has been accomplished by unloading at the elevator, then reloading into wagons and conveying the grain to the cars upon the railroad right of way. If this side track were provided so that the grain might be unloaded direct from the elevator into the cars by means of chutes the railroad company's yearly income therefrom would be increased to at least $3,000. According to the testimony of the railroad experts the original cost for putting in this side track would not exceed $450 and the cost of its maintenance would be small indeed. It is evident that instead of suffering a loss by reason of the construction of this side track the railroad company would realize a reasonable net income on the amount necessarily expended.

To recapitulate:

1. The statute in question does not restrict or burden interstate commerce, and the subject-matter thereof is within the jurisdiction of the state courts.

2. It is not repugnant to the due process clause of the fourteenth amendment to the federal constitution.

3. It does not take or damage the property of plaintiff in error without just compensation, in violation of section 21, article 1, Nebraska Constitution, as construed by the supreme court of Nebraska.

4. It is not violative of section 15, article 3, Nebraska Constitution, as being special or class legislation as construed by the supreme court of Nebraska.

5. It is elementary that federal courts will follow the construction placed upon state statutes by the supreme court of such states.

WHEREFORE, we ask that this statute be sustained and the decision of the supreme court of Nebraska be affirmed.

Respectfully submitted,

W. T. THOMPSON, Attorney General,

GRANT G. MARTIN, Deputy Attorney General,

For Defendant in Error.

Lincoln, December 13, 1909.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 128.

THE MISSOURI PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

v.

THE STATE OF NEBRASKA *ex Rel.* THE FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This action was originally brought by the Elevator Company against the Railway Company to compel, by writ of mandamus, the Railway Company to construct, equip, and maintain a switch or side-track on its right of way so as to enable the Elevator Company to load its grain directly from the elevator into the cars of the Railway Company.

After due trial the District Court of Nebraska found for the Elevator Company and entered the following decree:

"This cause came on for hearing upon the amended application for writ of mandamus and the answer thereto and the evidence was submitted to the court, on consideration whereof, the court finds all the issues in favor of the relator. The court finds that the elevator in controversy was built adjacent the right of way of the respondent company's railroad at Strausville in Richardson county, Nebraska, and was completed and in operation prior to the first day of April, 1905, and that said elevator has a capacity of 15,000 bushels or more. The court further finds that on the 31st day of May, 1906, an application was made in writing by the relator to the respondent for a site for the construction of an elevator on the respondent railroad's right of way at the said station of Strausville, and that after a period of more than sixty days had passed the respondent company had wholly failed, refused, and neglected to grant the site as requested; that on the 2nd day of August, 1906, the relator requested the respondent in writing to build a side-track connecting relator's elevator at said station of Strausville with respondent's railroad and that said request has been wholly disregarded.

"It is therefore considered by the court that a peremptory writ of mandamus issue against the said Missouri Pacific Railway Company, a corporation respondent in this said cause, commanding it forthwith to erect, equip, and maintain proper switch or side-track leading from the respondent's main line of railroad to the said relator's elevator which is situate adjacent the right of way of said respondent's railroad at the station of Strausville, in Richardson county, Nebraska, which switch or side-track shall be of suitable length to approach as near as necessary to approach, the said relator's elevator at the said station of Strausville as to enable the said relator company to load grain directly from its said elevator into respondent's cars on said switch or side-track.

"To all of this the said railway company, respondent, excepted and prayed a bill of exceptions and asked an allowance of a supersedeas from this order allowing a peremptory writ of mandamus which the court hereby grants until the matter in controversy herein may be adjudicated by the Supreme Court of

the State of Nebraska. The bond of supersedeas is fixed at $500. Forty days granted from the rising of the court within which to present the bill of exceptions. It is further considered by the court that the respondent pay the costs of this action taxed at $——."

Appeal was taken by the Railway Company to the Supreme Court of the State where the judgment of the trial court was in all respects sustained and affirmed. From the judgment of the Supreme Court of Nebraska, the Railway Company has by this proceeding prosecuted error to this honorable Supreme Court of the United States for further review.

There can be no dispute here about the material facts involved. The pleadings admit some; undisputed testimony and the findings of the trial court, reaffirmed by the Supreme Court of the State, and unassailed by plaintiff in error in any assignment of error, settle the other facts beyond debate.

The Missouri Pacific Railway Company, the plaintiff in error, is a corporation organized and doing business as an interstate common carrier, under and by virtue of the laws of the State of Missouri, in and through several States, including the State of Nebraska. The Farmers' Elevator Company, of Strausville, Nebraska, is a corporation organized and doing business at Strausville, Nebraska, under and by virtue of the laws of the State of Nebraska. It is engaged in the operation of a public grain elevator, located adjacent to the right of way occupied by said Railway Company.

For several years the Railway Company has maintained a side-track and switch for another elevator company doing an elevator business at Strausville; but, after refusing to allow the complainant company in the case a site for an elevator on its right of way, it has also refused to construct a side-track to the elevator of complainant company, built off but adjacent to its right of way.

It appears in evidence that Strausville is surrounded by a rich and fertile grain-producing country, thickly populated; that the Elevator Company has handled several thousand bushels of grain every week, some of it in the past shipped to points out of the State, and much of it sold on board the cars (p. 26, Record). Of course, such grain as may be sold on board the cars is for shipment to any point either in or out of the State, as the purchaser may direct.

ARGUMENT.

The right of the Elevator Company to force the Railway Company to construct a side-track on its right of way rests in the power of the State to enact legislation for that purpose and to that end. The constitution of the State provides:

> "Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, *under such regulations as may be prescribed by law.* And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads of the State."
>
> (Nebraska Constitution, Art. 11, Sec. 4.)

Also,

> "The legislature shall pass laws to correct abuses and prevent unjust discriminations and extortion in all charges of express, telegraph and railroad companies in this State, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises."
>
> (Nebraska Constitution, Art. 11, Sec. 7.)

Authorized by these provisions of the fundamental law of the State, the legislature of Nebraska enacted the following statute:

"Every railroad corporation shall give to all persons and associations reasonable and equal terms for the transportation of any merchandise or other property of every kind and description upon any railroad owned or operated by such corporation within this State, and for terminal handling the use of the depot and other buildings and grounds of such corporation, and at any point where its railroad shall connect with any other railroad, reasonable and equal terms and facilities of interchange, and shall promptly forward merchandise consigned or directed to be sent over another road connecting with its road, according to the directions therein or accompanying the same; and every railroad company or corporation operating a railroad in the State of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right of way, and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made shall erect, equip and maintain a side-track or switch of suitable length to approach as near as four feet of the outer edge of their right of way when necessary, and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants adjacent to their right of way for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favoritism or discrimination in any respect whatever. Provided, however, that any elevator hereafter constructed, in order to receive the benefits of this act, must have a capacity of not less than fifteen thousand bushels" (General section 4702, Compiled Statutes of Nebraska).

The argument presented by plaintiff in error assails the validity of the statute quoted. If the statute is valid, an

affirmance of the judgment of the Supreme Court of Nebraska follows.

The Nebraska statute does not operate to take the property of the Railway Company within the meaning of the Constitution without its consent and without compensation, and is not in violation of the Fourteenth Amendment of the Constitution.

> "Railroads have from the very outset been regarded as public highways, and the right and duty of the Government to regulate in a reasonable and proper manner the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the Government springs from the fact that in relation to all highways, the duty of regulation is governmental in its nature." (Wisconsin, Minnesota and Pacific Railroad *v.* Jacobson, 179 U. S., 296.)

This doctrine is supported by Olcott *v.* Supervisors, 16 Wall., 678, 684; Cherokee Nation *v.* Southern Kansas Railway Company, 135 U. S., 641; United States *v.* Joint Traffic Association, 171 U. S., 505-569, 570; Lake Shore Railway Company *v.* Ohio, 173 U. S., 285, 301.

The Nebraska statute is valid by whatever test applied. Obviously, it is within the provisions of the State constitution hereinbefore quoted. If there were any question about it, the fact that it has been so held by the Supreme Court of that State ends the debate, for the rule is well settled that this court will not disturb the pronouncement of the Supreme Court of any State wherein a legislative act is held by it to be in harmony with the constitution of the State.

The act in question is a clear exercise of the police power enjoyed by every sovereignty on which rests the burden to care for the public health, safety and convenience. If the common carrier doing an interstate as well as intrastate business is above the reach of local authority in respect to its

local facilities and equipments when the public welfare or public convenience is disregarded by the carrier, the rule of this court on the subject for generations must be set aside.

It will not be questioned that the carrier whose charter to exist and to do business comes from the State must respond to the public with reasonable and undiscriminating accommodations for the transaction of its business with the public. The cost of the depot, its equipment and maintenance together with incidental side-tracks and switches and other expenses, find full compensation in the power under the law, of the carrier to charge and collect tolls and rates sufficiently high to return a reasonable dividend on the investment.

In Wisconsin, Minnesota and Pacific Railroad *v.* Jacobson, 179 U. S., 287, the principle involved here is discussed at some length and with great clearness and force. In that case, a statute of Minnesota was assailed as in contravention of the commerce clause and the Fourteenth Amendment of the Constitution. The Minnesota law, among other things, commanded common carriers crossing each other's lines to provide connections by which cars could be switched from one road to the other. The railroads in that suit operated intersecting lines of railway and after notice neglected and refused to build connecting switches for the transfer of cars as provided in the law.

Action was brought to compel by writ of mandamus the railroads to construct the necessary connecting tracks. Both railroads defended on the ground "that to construct a connecting track as asked for in the petition and as provided in the statute mentioned would require the company to go outside of its right of way and to condemn land for that purpose;" and, further, "that to compel the companies to make such connection would violate the commerce clause and also the Fourteenth Amendment of the Federal Constitution," and therefore the statute was void.

It will be observed the Minnesota statute went much further than the Nebraska statute undertakes to go. Under the

Minnesota law it was sought to compel the carriers not simply to build tracks on their own right of way, but to compel them to go outside and purchase additional ground on which to lay the connecting tracks, while in the case at issue here it is only sought to secure an additional side-track on the right of way already owned by the railway company.

The answer of the court to the first defense of the interstate common carrier in the Minnesota case is found in the opinion and reads as follows:

> "Although to carry out the judgment may require the exercise by the plaintiff in error of the power of eminent domain, and will also result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the application of the defendant in error. Mayor, etc., *v.* Northwestern Railway, 109 Mass., 112; People *v* Railroad, 58 N. Y., 152, 163; People *v.* Boston Railroad Company, 70 N. Y., 569; People *v.* Railroad Company, 104 N. Y., 58, 67 (Wisconsin, Minnesota and Pacific Railroad Company *v.* Jacobson, 179 U. S., 302)."

On the point that the Minnesota statute was in conflict with the Federal Constitution, the court said:

> "Plaintiff in error urges that transporting cattle from Minnesota to Iowa constitutes interstate commerce, and that neither the State of Minnesota nor its railroad commission has the right to in any manner interfere with or regulate such commerce. The judgment in this case, however, neither regulates nor interferes with that commerce, nor does that part of the statute upon which the judgment is founded. Whether any other portion of the statute does regulate such commerce is beside the question, and it is not necessary to here decide. To provide at the place of intersection of these two railroads, at Hanley Falls, ample facilities by track connections for transferring any and all cars used in the regular business of the respective lines of road from the lines or tracks of one of said companies to those

> of the other, and to provide at such place of intersection equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding and delivering of property and cars to and from their respective lines, as provided for by this judgment, would plainly afford facilities to interstate commerce, if there were any, and would in no wise regulate such commerce within the meaning of the Constitution. That is all that has been done by the judgment under review. A State may furnish such facilities or direct them to be furnished by persons or corporations within its limits without violating the Federal Constitution." (Wisconsin M. & P. R. R. Co. *v.* Jacobson, 179 U. S., 295.)

The logic of the opinion is a complete refutation of the point made in this case that the attempt of Nebraska to compel the defendant railway company to construct a connecting side-track on its right of way to the elevator of plaintiff is an attempt to regulate interstate commerce. For, if to require connecting tracks to be constructed off the right of way for the convenience of the public is "in no wise to regulate such commerce within the meaning of the Constitution," certainly to require a side-track or switch to be laid on the right of way could not be construed to regulate commerce in the slightest degree. It is self-evident that a side-track or a switch on the right of way, as well as a connecting track off the right of way, is—depending, of course, on the facts of each situation—for the public convenience and is rightfully the subject of State control. Instead of being a regulation of commerce among the States within the meaning of the Constitution, it is in fact simply a facility for the use and convenience of the public which the common carrier is bound to furnish if the legislative will commands.

In the exercise of its police power the State may legislate for the public convenience as well as for the public health, morals, or safety. The side-track in question is for the con-

venience of the public in loading its grain into the cars of the railroad company. The side-track at Strausville, now connecting with another elevator at that station, was constructed for the convenience of the public and for no other purpose. It is a public inconvenience, expensive in time as well as money, to haul the grain in wagons from the elevator to the car.

Public convenience was the justification for the Ohio statute which required interstate carriers to stop at stations long enough to allow passengers to get on and off the trains—a statute which was sustained by this court in Lake Shore and Michigan Southern Railway Co. *v.* Ohio, 173 U. S., 285.

The opinion in that case, at page 300, reads:

> "The power of the State by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals or the public safety. Whether legislation of either kind is inconsistent with any power granted to the General Government is to be determined by the same rules."

The opinion continues, on page 303, as follows:

> "We perceive in the legislation of Ohio no basis for the contention that the State has invaded the domain of national authority or impaired any right secured by the National Constitution. In the recent case of Jones *v.* Brim, 165 U. S. 180, 182, it was adjudged that, embraced within the police powers of a State was the establishment, maintenance and control of the public highways, and that under such powers, reasonable regulations incident to the right to establish and maintain such highways could be established by the State. And the State of Ohio by the statute in question has done nothing more than to so regulate the use of a public highway established and maintained under its authority as will reasonably promote the public convenience. It has not unreasonably obstructed the freedom of commerce among the States.

> Its regulations apply equally to interstate and domestic railroads. Its statute is not directed against interstate commerce, but only incidentally affects it."

The judgment of this court in the Lake Shore case, *supra,* is supported by a long line of decisions. Among them may be noted Gilman *v.* Philadelphia, 3 Wall., 713; Pound *v.* Turck, 95 U. S., 459, 464; Escanaba Company *v.* Chicago, 107 U. S., 678, 683; Cardwell *v.* American Bridge Company, 113 U. S., 205, 208; Huse *v.* Glover, 119 U. S., 543; Western Union Telegraph Co. *v.* James, 162 U. S., 650, 662, and Richmond & Allegheny Railroad *v.* Patterson Tobacco Co., 169 U. S., 311, 315.

It will be observed the Nebraska statute on its face discloses one of its purposes to be to compel the common carrier doing business in the State to deal fairly and without discrimination with its patrons and the public. In that respect, it is merely declaratory of the common law. This action is to give vitality and effect to the principle that a public-service corporation owes equal duties to every citizen of the body politic.

The State has sought to establish equal facilities and fair treatment to the public doing business with the Railway Company at Strausville and its statute had and has no other effect; and in no way, either directly or remotely, does its enforcement under the facts in the case interfere, control or burden interstate commerce.

If it be argued that the Elevator Company as well as the Railway Company is engaged in interstate commerce because a witness testified that the company had shipped grain out of the State, the answer is, first, such testimony is immaterial; and, second, it does not establish the fact that the business of the Elevator Company is all interstate, for the same witness testified that much of the grain was sold on board the cars at Strausville (Transcript, p. 26). Once on the cars, it is freightable to any point on the railroad, either in or out of the State, as the owner may decide. The desti-

nation of the grain is a fact wholly immaterial and entirely outside the material issues. It sheds no light on the power of the State to require reasonable and equal accommodations for the public in loading the freight.

The vital and material issue in this controversy is how to get the grain on board the cars. Must the public be put to the inconvenience and expense of hauling it in wagons, first, from the farms to the elevator, and afterwards again in wagons from the elevator to the cars? Or shall the Railway Company furnish a reasonable and usual facility, a side-track to the elevator?

The statute is a reasonable provision and places no irksome or unnecessary burden on the railroad, whose business is with the grain-shipping public at the elevator just as it is with the passenger public at the depot.

If it be argued that the decision in Missouri Pacific Railway Company *v.* Nebraska, 164 U. S., 403, is authority against the statute, the attention of the court is called to the fact that in that case it was sought to compel the railway company to surrender its right of way to a few individuals on which they might build a structure in which to store their grain. Neither in point of fact nor principle does that case resemble the one at bar. The opinion itself discloses the difference. A paragraph is quoted as follows:

> "To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and for a public use, to an association of private individuals, for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control for the use of such land, or of the building to be erected thereon, to the railroad

company for the accommodation of its own business, or for the convenience of the public." (Missouri Pacific Railway Company *v.* Nebraska, 164 U. S., 417.)

The constitutional provision against taking property without compensation was not intended to deny the State the proper exercise of its police powers.

It is argued that because the construction of a side-track ordered by the court in this case to the elevator of the Elevator Company will cost the Railway Company $1,732 the constitutional provision as to compensation has been violated. This point is certainly not well taken in view of the settled rule that the exercise of police power by the State is justified or condemned as the facts warrant without regard to the question of compensation. The police power is for the public welfare and is exercised without any consideration of cost or compensation to or from anybody.

In C., B. & Q. Ry. Co. *v.* Drainage Commissioners, 200 U. S., 562, the State of Illinois was sustained in the exercise of its police powers, although it cost the railway company more than $8,000 to comply with the judgment of the court.

In that case it was held:

> "Uncompensated obedience to a regulation enacted for the public safety under the police power of the State is not taking property without due compensation, and the constitutional prohibition against the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments" (p. 562).

Upon the conceded facts, the State had full jurisdiction in the premises and the Federal Interstate Commerce Commission under the terms of the Hepburn Act is without jurisdiction over the subject matter involved in the case at bar.

The Railway Company denies the jurisdiction of the State courts over the subject matter and asserts that the act of Congress of June 29, 1906, known as the Hepburn Act, vests in the Federal Interstate Commerce Commission exclusive jurisdiction to hear and determine the controversy between the parties to this suit.

An examination of the language of the Hepburn Act hereinafter quoted is a complete answer to such contention. The act in express terms confers jurisdiction on the Commission of applications for "switch connections with any such lateral, branch line of railroad or private side-track." It does not even purport nor by implication can it be construed to confer jurisdiction on the Federal Commission where the application is for a switch and side-track on the right of way of the railroad for the convenience of a public elevator already constructed on the land immediately adjacent to such right of way.

If the application be for a connection by switch with a lateral or branch line of road or a private side-track, the Federal Commission has jurisdiction in the premises. But such is not the application in the case here made. Here, a public elevator constructed and operated immediately alongside the right of way asks that a switch or side-track be constructed on the right of way immediately alongside the elevator. No connecting switch or side-track is asked for a lateral or branch line of road or a private side-track.

The language of the Hepburn Act on this subject is as follows:

> "Any common carrier subject to the provisions of this act, upon application of any lateral, branch line

> of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection *with any such lateral, branch line of railroad or private side-track* which may be construed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application thereof in writing by any shipper, such shipper may make complaint to the Commission as provided in section thirteen of this act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor and the Commission may make an order, as provided in section fifteen of this act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money."

In Lake Shore case, 173 U. S., *supra,* the argument was made that under the Interstate Commerce law of 1887 the Federal Commission had jurisdiction to the exclusion of State authority on the subject matter in that case. The argument was overruled. Indeed, it seems to be the settled doctrine of this court that when the State exercises its police powers in protecting the public health or convenience in a way which does not operate as a regulation of interstate commerce within the meaning of the Constitution the State commissions and courts have jurisdiction.

The Federal tribunal has jurisdiction only of such matters as directly involve interstate commerce, and it is beyond comprehension how it can be seriously contended that Con-

gress intended by the Hepburn Act to confer on the Interstate Commerce Commission jurisdiction at all, to say nothing of exclusive jurisdiction, as argued by counsel, in cases like the one at bar.

It is respectfully submitted that the judgment of the Supreme Court of Nebraska should be affirmed.

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Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 127.

THE MISSOURI PACIFIC RAILWAY CO., PLAINTIFF IN ERROR,

vs.

THE STATE OF NEBRASKA,

AND

No. 128.

THE MISSOURI PACIFIC RAILWAY CO., PLAINTIFF IN ERROR,

vs.

THE STATE OF NEBRASKA, ETC.

REPLY BRIEF.

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